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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 164

ALD M. HILL, JAY R. BENTON, AND GEORGE B. ILLINGS, EXECUTORS OF THE WILL OF WARREN . HILL, PETITIONERS,

vs.

CHARLES S. SMITH.

RIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1923.

CERTIORARI AND RETURN FILED JANUARY 4, 1923.

(28,465)

(28,465)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 510.

DONALD M. HILL, JAY R. BENTON, AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS,

vs.

CHARLES S. SMITH.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1 to 28 inclusive, of the files, records, and proceedings of the said Superior Court, is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonthwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of jadicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[SEAL.]

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Warren M. Hill of Boston, within our County of Suffolk, to the value of ten thousand dollars and summon the said Hill (if he may be found in your precinct) to appear before our Justices of our Superior Court, to be holden at Boston, within and for our said County of Suffolk,
on the first Monday of May next, then and there in our said
2 Court to answer unto Charles S. Smith of Lincoln in our County of Middlesex,

In an Action of Contract.

Declaration.

And the plaintiff says that by the consideration of our Justices of our said Court holden at Boston aforesaid within and for our said County of Suffolk, to wit, on the second day of May, A. D. 1904, he recovered judgment against the defendant for the sum of four thousand four hundred and seventy-eight dollars damages and nineteen and 79/100 dollars costs of suit as appears of record; that said judgment remains in full force and effect; and that said judgment has not been satisfied either in whole or in part.

CHARLES S. SMITH,
By His Attorney, PRESTON KEYES.

To the damage of the said Smith (as he says) the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And whereas the said Smith says, that the said Hill has not, in his own hands and possession, goods and estate to the value of ten thousand dollars aforesaid, which can be come at
3 to be attached, but hath intrusted to and deposited in the hands and possession of Donald M. Hill, Calvin Austin and Henry C. Wiley, all having usual places of business in said Boston, as they are the executors of the will of William H. Hill, who at the time of his decease had a usual place of business in said Boston, Trustees of the said Defendant goods, effects and credits, to the said value: we command you, therefore, that you summon the said supposed Trustees (if they may be found in your precinct), to appear before our Justices of our said Court, to be holden as aforesaid, to show cause, if any they have, why execution to be issued upon such judgment as the said Plaintiff may recover against the said Defendant in this action (if any) should not issue against his goods, effects or credits, in the hands and possession of the said Trustees.

And have you there this writ with your doings therein.

Witness, John A. Aiken, Esquire, at Boston, the thirtieth day of March, in the year of our Lord one thousand nine hundred and fourteen.

FRANCIS A. CAMPBELL,
Clerk.

On which said writ return of service was made in the words and figures following, to wit:

4 "SUFFOLK, *ss:*

Boston, April 1st, 1914.

By virtue of this writ, I this day summoned the within named trustees Donald M. Hill, Calvin Austin and Henry C. Wiley, Executors as within described, to appear and show cause at Court as within directed, by delivering at eleven o'clock A. M., to said Hill and said Wiley and by delivering thirty minutes past twelve o'clock P. M. to said Austin each an attested copy of this writ and on the seventeenth day of April, 1914, I attached a chip as the property of the within named defendant Warren M. Hill and afterwards on the same day summoned said defendant to appear and answer at Court as within directed, by delivering to him in hand an attested copy of this writ.

JEREMIAH G. FENNESSEY,
Deputy Sheriff."

Fees:

Service	4.00
Copies	4.00
Travel	.10
	$8.10

On said first Monday of May, A. D. 1914, the Plaintiff appeared by Prescott Keyes, Esq., his attorney, as aforesaid, and entered the above entitled action.

Thereafter on the sixth day of May, in said year, the following appearance in writing was entered, to wit:

5 *Appearance.*

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191—.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft.

In the above action I appear for defendant.

IRVING F. CARPENTER,
78 Devonshire St., Boston.

And on the twelfth day of said May, 1914, the following appearance in writing was entered, to wit:

Appearance.

SUFFOLK, *ss:*

Superior Court, —— sitting, 1914.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft., and DONALD M. HILL, CALVIN AUSTIN, and Henry C. Wiley, as Executors of the Will of William H. Hill, Alleged Trustees.

In the above action we appear for Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of the will of William H. Hill, alleged Trustees.

BLODGETT, JONES, BURNHAM & BINGHAM.

Also on said twelfth day of May, 1914, said Trustees filed their sworn answer, as follows, to wit:

6 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

CHARLES S. SMITH, Plaintiff,

v.

WARREN M. HILL, Defendant, and DONALD M. HILL, CALVIN AUSTIN, and Henry C. Wiley, as executors of the Will of William H. Hill, Alleged Trustees.

Trustees' Answer.

And now come Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of the will of William H. Hill, alleged trustees of the defendant in the above entitled action, and for answer say that at the time of the service of the plaintiff's writ upon them they had not in their hands or possession any goods, effects or credits of said defendant.

DONALD M. HILL.
CALVIN AUSTIN.
HENRY C. WILEY.
Executors of the Will of William H. Hill.

SUFFOLK, *ss:*

Boston, May 6, 1914.

Personally appeared the above named Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of the will of William H. Hill, and made oath that the above answer is true.

Before me,

DANA T. GALLUP,
Justice of the Peace.

7 Subsequently on the third day of June, 1914, said Defendant filed his answer, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

#79103.

CHARLES S. SMITH

vs.

WARREN M. HILL & Trustees.

Answer of Defendant Warren M. Hill.

Now comes the defendant in the above entitled action and denies each and every material allegation, item and particular in the plaintiff's writ and declaration contained. And further answering the defendant says that by virtue of proceedings instituted in the United States District Court for the District of Massachusetts on the twentieth day of June, 1912 under the provisions of the act of Congress of July 1, 1898, entitled "The Bankruptcy Act," the defendant was discharged on December 3, 1912 from all debts and claims including the plaintiff's claim (if any) against this defendant which were provable against his estate in bankruptcy.

A true copy of the original certificate of discharge is hereto annexed.

WARREN M. HILL,
By His Attorney, IRVING F. CARPENTER.

Attached to the foregoing Answer is the following, to wit:

8 District Court of the United States, District of Massachusetts.

Whereas, Warren M. Hill of Boston in said District, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this Court that said Warren M. Hill be discharged from all debts and claims which are

made provable by said Acts against his estate, and which existed on the 20th day of June, A. D. nineteen hundred and twelve, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable James M. Morton, Jr., judge of said district court, and the seal thereof this 3rd day of December, A. D. 1912.

[L. S.] MARY E. PRENDERGAST,
Deputy Clerk.

I, Charles K. Darling, Clerk of the District Court of the United States, for the District of Massachusetts, hereby certify that
9 the foregoing is a true copy of the original certificate of discharge.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said court, this 19th day of May A. D. 1914

[SEAL.] CHARLES K. DARLING,
Clerk.

On the twelfth day of June 1914, said defendant filed his claim for a trial by jury as follows, to wit:

Jury Claim.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191–.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft.

In the above action I claim a trial by jury.
IRVING F. CARPENTER,
Attorney for Defendant.

Thence the case was continued from time to time unto the fifteenth day of March 1915, when on said day, the plaintiff filed his Affidavit of No Defense as follows, to wit:

10 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

CHARLES S. SMITH

vs.

WARREN M. HILL and Trustees.

Affidavit of no Defence.

I, Charles S. Smith, the plaintiff in the above entitled action on oath declare that the statements contained in the declaration in said action are true, that in my belief there is no defence to said action, that the schedule filed by the defendant in the bankruptcy proceedings referred to in the defendant's answer does not contain my name which was known to said defendant, and that I did not have notice nor actual knowledge of said proceedings.

CHARLES S. SMITH.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

March 12, 1915.

Then personally appeared the above-named Charles S. Smith and made oath to the truth of the foregoing affidavit by him subscribed before me,

JOHN A. McNAMARA,
Justice of the Peace.

11 Whereupon the following Order issued by the Court, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court, January Sitting, 1915, viz., March 15, 1915.

CHARLES S. SMITH

vs.

WARREN M. HILL & Trustees.

And now in the above action the Plaintiff, on the fifteenth day of March A. D. 1915, having filed an affidavit verifying the cause of action, and swearing in his belief there is no defence, it is ordered

that the Defendant forthwith show cause in writing and under oath why judgment should not be given for the Plaintiff.

FRANCIS A. CAMPBELL,
Clerk.

Acts 1911, Chap. 305.

Afterward, to wit: on the nineteenth day of said March 1915, the aforesaid order was returned into Court with the following endorsed thereon, to wit:

12 SUFFOLK, *ss:*

Boston, March 18th, 1915.

I have this day notified the within-named defendant (as provided by the Acts of 1911, Chap. 305) of the within order by mailing, postage prepaid, to Warren M. Hill, The Fenway 10, Boston, Massachusetts a copy of the within order.

PRESCOTT KEYES,
Attorney for Plaintiff.

Subscribed and sworn to before me, this eighteenth day of March 1915.

[SEAL.] EDITH MELVIN,
Special Commissioner.

And thereupon, on the twenty-fifth day of March 1915, said defendant filed his Affidavit of Defence as follows, to wit:

13 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

#79103.

CHARLES S. SMITH

vs.

WARREN M. HILL & Trustees.

And now comes the defendant in the above entitled action and on oath says that in his belief there is a good defence to said action, namely that by virtue of proceedings instituted in the United States District Court for the District of Massachusetts on the 20th day of June, 1912, under the provisions of the Act of Congress of July 1, 1898 entitled "The Bankruptcy Act" the defendant was discharged on December 3, 1912 from all debts and claims including the plaintiff's claim (if any) against the defendant which were provable against his estate in bankruptcy. And the defendant says that he relies upon said discharge in bankruptcy as a defence to this action and that a true copy of the original certificate of discharge is an-

nexed to and made a part of his answer duly filed in this cause of action.

WARREN M. HILL.

SUFFOLK, *ss:*

March 24, 1915.

Then personally appeared the above named Warren M. Hill and made oath that the foregoing affidavit by him subscribed is true, before me.

IRVING F. CARPENTER,
Justice of the Peace.

Thence the suit was continued from time to time, unto the fifth day of May 1916, when, on said day, the Plaintiff filed the following suggestion of Death and motion to cite in Executors, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

SMITH

vs.

HILL.

And now the plaintiff suggests the death of the principal defendant and prays that Donald Mackay Hill of Newton, Jay R. Benton of Belmont and George B. Billings of Boston, all within said Commonwealth, as they are the executors of the will of said defendant may be summoned in to defend.

CHARLES S. SMITH,
By His Attorney, PRESCOTT KEYES.

And the following was endorsed thereon, to wit:

SUFFOLK, *ss:*

Boston, May 5, 1916.

Mo. Allowed by the Court. Process for service ord-d to issue.

Attest:
H. E. BELLEW,
Ass't Clerk."

Whereupon the following Order — issued by the Court, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court, April Sitting, A. D. 1916, to wit., May 5, 1916.

On the foregoing Motion Ordered, that the Plaintiff give notice to said Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, to appear at said Court to be held at Boston, within and for said County, on the first Monday of June next, by serving
16 them with a true and attested copy of said motion with this Order thereon, fourteen days at least before said first Monday of June that they may then and there appear and defend said action if they see fit.

By the Court,

FRANCIS A. CAMPBELL,
Clerk.

Subsequently, on the twenty-third day of May, 1916, a copy of the aforesaid Suggestion of Death and motion to cite in Executors to defendant said action, with Order attached thereto, was returned into Court with the following return and acceptance of service endorsed thereon, to wit:

"SUFFOLK, *ss:*

Boston, May 10th, 1916.

I this day served the within Motion and Order of Court thereon, upon the within named respondents, Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, by delivering to Messrs. Blodgett, Jones, Burnham & Bingham, their Attorneys, an attested copy hereof for each of said respondents.

PETER P. FEE,
Deputy Sheriff."

Fees:

Service	3.00
Copies	3.00
Travel	.10
	$6.10

17 "Due and sufficient service of the within Motion and Order of Court is hereby accepted for the within named Jay R. Benton and George B. Billings, Executors.

By Their Attorney-, BLODGETT, JONES, BURNHAM & BINGHAM."

May 10, 1916.

On the thirteenth day of June 1916, the following appearance in writing was entered, to wit:

Appearance.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191-.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft.

In the above action I appear for Donald Mackay Hill, Jay R. Benton, Geo. B. Billings, Exors.

IRVING F. CARPENTER,
78 Devonshire St.

18 Thence the case was continued from time to time, unto the first day of October 1917, when, on said day, said defendant waived his claim for a trial by jury as follows, to wit:

Jury Claim.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191-.

No. 79103.

SMITH, Plff.,

v.

HILL, Dft.

In the above action the deft. waives a trial by jury.

IRVING F. CARPENTER,
Attorney for Deft.

Thence the suit was continued unto the fifteenth day of November 1917, when, on said day, the case having been submitted to the Court, after a full hearing, the Court found as follows, to wit.

SUFFOLK, *ss:*

Superior Court, October Sitting, 1917.

CHARLES S. SMITH, Plff.,

—

WARREN M. HILL, Deft.

The Court finds for the Plaintiff, and assesses damages in
19 the sum of Eight thousand one hundred and fifty dollars ($8,150.00).

JOHN A. AIKEN,
Chief Justice of the Superior Court.

Whereupon on the fourth day of December 1917, said defendants proposed exceptions as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

#79103.

CHARLES S. SMITH

vs.

DONALD MACKAY HILL et als., Ex'ors & Trs.

Defendants' Bill of Exceptions.

This is an action of contract brought by writ dated March 30, 1914 on a judgment for Four Thousand four hundred seventy-eight ($4,478.00) dollars secured by the plaintiff on the second day of May A. D. 1904 against Warren M. Hill, late of Boston, Massachusetts. The plaintiff's declaration did not state the cause of action upon which the judgment was founded. The defendant's answer set up a discharge in bankruptcy on December 3, 1912 and a duly authenticated copy of the original certificate of discharge was annexed to the answer. After commencement of the suit and before
20 trial Warren M. Hill died (October 26, 1915) and the action is now defended by his executors who were cited in by the plaintiff. The pleadings may be referred to.

At the trial the plaintiff read the pleadings, introduced in evidence a certificate of the clerk of the Superior Court for the county of Suffolk which showed that the judgment remained unsatisfied, and rested.

The defendants introduced in evidence a certified copy of the discharge in bankruptcy of Warren M. Hill and rested. The plaintiff introduced in evidence in rebuttal a certified copy of the schedule of

creditors in bankruptcy of Warren M. Hill in which schedule the name of the plaintiff Charles S. Smith did not appear. No evidence other than the foregoing was introduced by either party.

The defendants then submitted the following requests for rulings:

1. The certified copy of the defendant's discharge in bankruptcy on the facts in this case is prima facie evidence that the plaintiff's debt was properly scheduled and that the plaintiff was duly notified of the defendant's bankruptcy.

2. The burden is upon the plaintiff to show that his debt or judgment was not scheduled according to law in the defendant's list of claims filed in the bankruptcy Court prior to his discharge
21 in bankruptcy.

3. The burden is upon the plaintiff to show that he was not notified of the defendant's bankruptcy.

4. The burden is upon the plaintiff to show that he had no knowledge of the defendant's bankruptcy.

5. If you find that claims on the notes which were merged in the plaintiff's judgment were scheduled by the defendant in the name of the original payee of the notes, then the plaintiff's claim was properly scheduled.

6. In arriving at a finding in this case the Court must assume unless by a preponderance of the evidence the plaintiff has shown otherwise, that the bankruptcy proceedings of the defendant prior to and at the time of the adjudication of discharge were in all respects regular and in compliance with every requirement of the bankruptcy law.

7. The plaintiff's claim was a provable debt under the bankruptcy Act.

The word "defendant" in the foregoing requests refers to the original defendant Warren M. Hill. The fifth request of the
22 defendants was waived at the trial. The court gave the defendants' requests numbered 1, 2, 6 and 7 but refused requests numbered 3 and 4. To such refusal the defendants duly excepted. Thereupon court found for the plaintiff in the amount of Eighty-one hundred and fifty dollars and the defendants being aggrieved by such finding and by the refusal to rule as requested, and having duly excepted now pray that their exceptions may be allowed.

By Their Attorney, IRVING F. CARPENTER.

And the following were endorsed on said defendants' Bill of Exceptions, to wit:

"Exceptions allowed.

JOHN A. AIKEN,
C. J. S. C."

"The within bill of exceptions may be allowed.

PRESCOTT KEYES,
Atty. for Plaintiff."

On the seventh day of March, 1918, notice was sent to all attorneys and to Aiken, Chief Justice, Under Rule 54.

And on the twelfth day of March, in said year, the following was endorsed on the aforesaid Bill of Exceptions, to wit:

"Mar. 12, '18.

Allowed & filed.
Att.:

F. P. EWING,
Asst. Clk."

23 Thence the suit was continued, from time to time, unto the twenty-eighth day of February, 1919, when, on said day, the following Rescript was received in our said Superior Court, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Feb. 27, 1919.

In the Case of

CHARLES S. SMITH

vs.

DONALD MACKAY HILL et als., Ex'ors & Trs.,

pending in the Superior Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Exceptions overruled.

By the Court,

C. H. COOPER,
Clerk.

February 27, 1919.

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

24 Thence the suit was continued from time to time, unto the fourth day of June 1921.

And now, on the day and year last aforesaid, the following appearance in writing is entered, to wit:

Appearance.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 192-.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

DONALD M. HILL et al., Dfts.

In the above action we appear for plaintiff.
DUNBAR, NUTTER & McCLENNEN,
161 Devonshire St.

Also on said fourth day of June 1921, said plaintiff discharges said Trustees as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

CHARLES S. SMITH

v.

DONALD M. HILL et al.

Discharge of Trustees.

Now comes the plaintiff in the above entitled action and discharges the Trustees therein.
By His Attorneys, DUNBAR, NUTTER & McCLENNEN.

And on the sixth day of June, A. D. 1921, it is considered and ordered by the Court that Charles S. Smith, Plaintiff as aforesaid, recover against the estate of Warren M. Hill, in the hands and possession of Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, as aforesaid, the sum of nine thousand eight hundred and ninety-one dollars and thirty-eight cents damages; and costs of suit against said Executors, taxed at eighty-three dollars and fifty-three cents.

And on said sixth day of June, A. D. 1921, it is considered and ordered by the Court that Donald M. Hill, Calvin Austin and Henry C. Wiley (as they are the Executors of the Will of William H. Hill), Trustees as aforesaid, recover against **Charles S. Smith,**

Plaintiff as aforesaid, their costs of suit taxed at five dollars and thirty-three cents.

Executions, in favor of said plaintiff versus said estate and said Executors, issued June 8th, 1921.

26 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

27 *Docket Entries.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

CHARLES S. SMITH

vs.

DONALD MACKAY HILL et al., Executors and Trustees.

Counsel for plaintiff: Prescott Keyes, Dunbar, Nutter & McClennen, June 4, 1921.

Counsel for defendant: Irving F. Carpenter and for executors, June 13, 1916.

Trustees: 1, Donald M. Hill, 2, Calvin Austin, 3, Henry C. Wiley, executors; 4, 5, 6.

Counsel for Trustees: 1, Blodgett, Jones, Burnham & Bingham; 2, 3, 4, 5, 6.

[J]* and waived.

Action of contract.

Ad damnum, $10,000.

Disposed of April Sitting, 1921.

Trial List, Oct. Gen., 1917.

[*Letter erased.]

Date.	No.	
1914.		
4 May.	..	Entered. Declaration filed.
May 12.	1	Answer of Trustees Hill, Austin & Wiley.
June 3.	2	Defendant's answer.
June 12.	3	Defendant's jury claim.
1915.		
Mch. 15.	4	Plaintiff's affidavit of no defence and order issued.
Mar. 19.	5	Order returned.
Mar. 25.	6	Defendant's affidavit of defence.
28–30		
1916.		
May 5.	7	Plaintiff's suggestion of defendant's death and motion to cite in Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, to defend, allowed and process for service ordered to issue and notice to executors issued returnable first Monday June, 1916.
May 23.	8	Order returned.
1917.		
Oct. 1.	9	Defendants' waiver of jury claim.
Nov. 15.	10	Court finds for plaintiff and assesses damages in the sum of $8,150.00.
Dec. 4.	..	Defendants' proposed exceptions.
1918.		
Mar. 7.	..	Notice to all attorneys and Aiken, Chief Justice, under Rule 54.
Mch. 12.	11	Defendants' exceptions allowed and filed.
1919.		
Feb. 28.	12	Rescript from Supreme Judicial Court—"Exceptions overruled."
1921.		
June 4.	13	Plaintiff's discharge of trustees.
June 6.	..	Judgment for Plaintiff— Damages, $9,891.38 vs. estate. Costs, $83.53 vs. executors. Execution June 8th, 1921.
June 6.	..	Judgment for Trustees— Costs, $5.33.

(July 14th, A. D. 1921.)
Copy.

Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

31 COMMONWEALTH OF MASSACHUSETTS:

Boston, July 7, 1921.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Charles S. Smith vs. Donald M. Hill & others, executors, decided on the 27th day of February, 1919.

ETHELBERT V. GRABILL.
Reporter of Decisions.

ETHELBERT V. GRABILL.

32 RUGG, *C. J.*:

This is an action upon a judgment recovered against Warren M. Hill on May 2, 1904. The defence is a discharge in bankruptcy. After the commencement of this action the defendant died and the defence is conducted by his executors. The plaintiff introduced evidence that the judgment was unsatisfied and rested. The defendants introduced a certified copy of the discharge of Warren M. Hill granted on December 3, 1921, and rested. The plaintiff then showed in rebuttal a certified copy of the schedule of creditors in bankruptcy filed by Warren M. Hill, in which the name of the plaintiff did not appear. There was no further evidence. The judge ruled as requested by the defendants (1) that the certified copy of the discharge in bankruptcy made a prima facie case that the plaintiff's
33 case was properly scheduled and that he was duly notified of the debtor's bankruptcy, (2) that the burden was upon the plaintiff to show that his debt or judgment was not scheduled according to law in the bankruptcy court, (3) that the bankruptcy proceedings were regular, and (4) that the plaintiff's claim was provable in bankruptcy; but refused to rule that the burden was upon the plaintiff to show that he was not notified of the debtor's bankruptcy and had no knowledge thereof, and found for the plaintiff. The case comes here on the defendants' exceptions to the refusals to rule, and to the finding. The questions presented relate wholly to the burden of proof.

The statement of the general rule as to the burden of proof is plain. The plaintiff, by asserting in his declaration facts which if proved establish a liability to him on the part of the defendants, has the burden of proving those facts. It was said by Chief Justice Shaw in Powers v. Russel, 13 Pick. 69, at pages 76, 77, that "Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not
34 shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse

party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." Hughes v. Williams, 229 Mass. 467, and cases collected. See Commonwealth v. Thurlow, 24 Pick. 374, 380, 381.

Applying this rule to the case at bar, it is clear that the plaintiff made out his case by the production of his judgment. The defendants did not attack that case but sought to avoid its force by proof of another independent distinct and subsequent fact, namely, that after the rendition of the judgment Warren M. Hill had received a discharge in bankruptcy. That raised a new issue. It was an affirmative defence. The burden of proving it rested on the defendants as the parties alleging it. That burden required the proof of a discharge granted under such circumstances as would bar the plaintiff's judgment. The judge ruled that prima facie that burden was sustained by proof of the discharge in bankruptcy. But that ruling was not and could not rightly have been to the effect that the burden of proof was shifted to the plaintiff upon any phase of the discharge in bankruptcy. As was said by Bigelow, J., in
35 Central Bridge Corp. v. Butler, 2 Gray, 130, at page 132, "The burden of proof and the weight of the evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established." A prima facie case or prima facie evidence does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. Carroll v. Boston Elevated Railway, 200 Mass. 527, 536. The burden of proof continues to rest upon the party who either as plaintiff or as defendant asserts the fact necessary to enable him to prevail. He must ultimately establish that fact before he can become entitled to a finding or verdict in his favor, and the burden rests on him to do that, whatever may be the intervening effect of different kinds of evidence or evidence possessing under the law the varying degrees of probative value.

The pleading by the defendants of the discharge in bankruptcy as a bar to the plaintiff's claim imposed on them the burden of proving it. Whatever might be the prima facie effect of evidence of the discharge in bankruptcy granted by a court of competent jurisdiction, the burden of proof did not change to the plaintiff on that point, for the reason that the assertion of bankruptcy
36 as a bar was not a part of the plaintiff's case, but on the issues raised by the pleadings was alleged by the defendants as a separate, subsequent fact in avoidance of the plaintiff's claim. Hence the burden of proving a discharge of such nature and granted under such circumstances as would bar the plaintiff's claim was assumed by the defendants under the pleadings and it rested upon them to the end. Wylie v. Marinofsky, 201 Mass. 583.

This conclusion is supported in principle by Parker v. Murphy, 215 Mass. 72, 75. It seems to us to be supported by the greater weight of well reasoned decisions in other jurisdictions. Bailey v. Gleason, 76 Vt. 115, 118. Wineman v. Fisher, 135 Mich. 604, 608. Sloan v. Grollman, 113 Md. 192, 194. Calmenson v. Moudry, 137 Minn. 123, 125. Armstrong v. Sweeney, 73 Neb. 775. Bogart v. Cowboy State Bank & Trust Co. 182 S. W. Rep. 678, 682. Bunting Stone Hardware Co. Inc. v. Alexander, 190 S. W. Rep. 1152, 1153. There are, however, contrary decisions. Alling v. Straka, 118 Ill. App. 184. Matter of Peterson, 137 App. Div. (N. Y.) 435. Merchants Bank of Brooklyn v. Miller, 176 App. Div. (N. Y.) 412; affirmed without opinion in 221 N. Y. 490. Laffoon v. Kerner, 138 N. C. 281, 285. Other decisions respecting the burden of proving that the nature of the plaintiff's claim is such as not to be within the bar of a discharge in bankruptcy are not necessarily inconsistent with this result. Gatliff v. Mackey, 31 Ky. Law. Rep. 947. Van Norman v. Young, 228 Ill. 425. Hallagan v. Dowell,
37 139 N. W. Rep. 883. Roden Grocery Co. v. Leslie, 169 Ala. 579, related to a question of pleading. The distinction between the burden of proof, the weight of evidence and the prima facie effect of a discharge in bankruptcy does not seem to have been clearly drawn in them.

An analysis of s. 17 *a* (3) of the bankruptcy act of 1898, c. 541 (30 U. S. Sts. at Large, 550), as amended by U. S. St. 1903, c. 187, s. 5 (32 U. S. Sts. at Large, 798), confirms this view. It is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The fair implication of these words is that the person who asserts the force of the discharge as a bar must show in those instances where the debt has not been scheduled as required by the law and hence is within the exception to the bar of the discharge in bankruptcy, that nevertheless the debt is barred because within the excepted class of such unlisted debts belonging to creditors who either had notice or actual knowledge of the proceedings. In such cases it is only when a creditor is shown to belong to a class particularly excepted out of a class more generally excepted that the discharge in bankruptcy becomes a bar. A special exception is thus grafted upon another exception to the chief proposition that in the main a discharge in bankruptcy relieves the debtor from legal obligation to his
38 creditors. The burden of showing an exception as a relief from the apparent force of a written instrument rests upon the party asserting it in many kinds of cases. See, for example, A. J. Tower Co. v. Southern Pacific Co. 184 Mass. 472; Nichols v. Commercial Travellers' Eastern Accident Association, 221 Mass. 540, 546; Hughes v. Williams, 229 Mass. 467, 471. See Commonwealth v. Boyer, 7 Allen, 306. That principle would seem to be equally applicable to an exception to a general principle.

This conclusion is consonant with natural justice. A discharge in bankruptcy under the terms of s. 17 of the bankruptcy act is a bar to debts because creditors have had an opportunity to be heard in the bankruptcy courts upon the various matters there in litigation, have had the privilege of proving their claims and of sharing in the distribution of the assets of their debtors. Their claims thus have become res judicata. This result ensues from the basic proposition that the bankruptcy court acquired jurisdiction of the creditor, who thus has had his day in court. But if the creditor, through no fault of his own but wholly through the fault of the debtor upon whom is cast that duty by the law, has no notice or knowledge of the opportunity afforded him to appear in the bankruptcy court, there appears to be no natural justice in holding him bound by its adjudications. He is a stranger to the proceedings. Ordi-
39 narily one who asserts the binding force of a judgment by any court must show jurisdiction by that court over the person sought to be charged with the force of the judgment. He assumes the burden of proof on this point. Eastman v. Cooper, 15 Pick. 276, 285, 286. Bissell v. Wheelock, 11 Cush. 277, 279.

By the terms of s. 17 the discharge has the effect to bar a provable debt only when it was scheduled or the creditor had notice or actual knowledge of the proceedings. If these elements do not exist, then the creditor has no connection with the bankruptcy proceedings. A mere proffer of a discharge in bankruptcy, without facts to show that an unscheduled creditor by the terms of the act became subject to the jurisdiction of the bankruptcy court, does not make the discharge effective as to such creditor. As was pointed out in Birkett v. Columbia Bank, 195 U. S. 345, at page 349, "Section 7 of the bankrupt law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property and creditors. Among his duties he is required to 'prepare, make oath to, and file in the court * * * a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them * * *.' To the neglect of this duty the law attaches a punitive consequence." Then follows a quotation of s. 17 *a* (3) hereinbefore set forth. That consequence could hardly be puntive if, when it had appeared that the bankrupt had failed signally in the performance of this
40 duty by omission in his schedules of any reference to a creditor or his claim, the creditor still had the burden of proof of showing that he was not affected by the discharge. It would seem to be necessary, in order to give a real "punitive consequence" to non-compliance with the requirements of the statute, to cast upon the bankrupt or his representatives the burden of proving that the discharge affected the creditor. It further was said in Birkett v. Columbia Bank, at page 350: "The provisions of the law relied upon by plaintiff in error [s. s. 7, 17, 38, 65] are for the benefit of creditors, not of the debtor." Since the discharge is for the benefit of the debtor and not of the creditor there would seem to be a defect in the law if the burden of proving negative consequences arising from the default of the debtor should be borne by the creditor and

not by the debtor. We think a correct construction of the law does not lead to such a result.

There is nothing in Kreitlein v. Ferger, 238 U. S. 21, as we understand it, at all inconsistent with this conclusion. It there is said at page 26, "There are only a few cases dealing with the subject but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a prima facie defence, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge."

41 These words seem to us not to refer to the burden of proof but to the burden of evidence. See Powers v. Russell, 13 Pick. 69, 76; Central Bridge Corp. v. Butler, 2 Gray, 130, 132; Carroll v. Boston Elevated Railway, 200 Mass. 527, 536. See also 16 Cyc. 926, 932, 933, and cases there collected, and 10 R. C. L. s. 45, page 897, and cases there cited. The ruling made at the request of the defendant at the trial, as to the probative value of the discharge in bankruptcy, was in accordance with the statement quoted from Kreitlein v. Ferger. That opinion at pages 30, 31, referred to the burden of proof as to want of notice but held that it was unnecessary to decide the point. The view of the dissenting justices, as expressed at pages 35 to 38, appears to be unequivocal to the effect that the burden of proof to show that the creditor has notice or actual knowledge of the bankruptcy proceedings rests upon the party relying upon the discharge. The decision in Claflin v. Wolff, 98 N. J. L. 308, goes no further than Kreitlein v. Ferger.

It follows that in our opinion there was no error in the refusal to rule that the burden was upon the plaintiff to show that he was not notified and had no knowledge of the debtor's proceedings in bankruptcy.

There was no legal inconsistency or reversible error in ruling that the discharge in bankruptcy was on the facts prima facie evidence that the plaintiff's claim was scheduled and that the burden of producing some evidence to meet this prima facie proof rested upon the plaintiff and at the same time finding in favor of the plaintiff.

The plaintiff met the prima facie proof made out by the dis-

42 charge by proof from the record of the bankruptcy court that his debt was not scheduled by the bankrupt. The defendants having failed to show notice to or actual knowledge of the bankruptcy proceedings by the plaintiff, did not sustain the burden of proof resting upon them under their answer to show a discharge in bankruptcy effective as to the plaintiff.

Exceptions overruled.

42½ [Endorsed:] Smith vs. Hill. Certified copy of the Opinion of the Supreme Judicial Court.

43 COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts,

Do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this twenty-ninth day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

44 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this twenty-ninth day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

45 DONALD M. HILL et als., Executors of the Will of Warren M. Hill, Petitioners,

vs.

CHARLES S. SMITH, Respondent.

Stipulation.

It is hereby stipulated between the petitioners, Donald M. Hill, Jay R. Benton and George B. Billings, Executors of the will of Warren M. Hill, and the respondent, Charles S. Smith, that the transcript of record filed in the office of the Clerk of the Supreme Court of the

United States with the petition for Writ of Certiorari (No. 510 of October term, 1921), be taken as the return to said Writ dated the 19th day of November, 1921.

EDWARD E. BLODGETT,
Attorney for Petitioners.
EDWARD F. McCLENNEN,
Attorney for Respondent.

Dated this Seventh day of December, 1921.

45½ [Endorsed:] Suffolk Clerk's Office. Filed Dec. 20, 1921. Francis A. Campbell, Clerk Superior Court.

46 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Massachusetts, Greeting:

Being informed that there is now pending before you a suit in which Charles S. Smith is plaintiff, and Warren M. Hill, Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of William H. Hill, Alleged Trustees, are defendants, which suit was removed into the said Superior Court, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Superior Court and removed
47 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the nineteenth day of November, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

48 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

And now, here, the justices of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk, make return of this writ in a suit of record in said Court for said County wherein Charles S. Smith is plaintiff and Warren M. Hill was originally named as defendant, the death of said Warren M. Hill having been suggested on the fifth day of May, 1916, and Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors of the will of said Warren M. Hill having appeared

on the thirteenth day of June 1916, in which suit Donald M. Hill, Calvin Austin and Henry C. Wiley "as they are the executors of the will of William H. Hill," were named as trustees, by annexing hereto and sending herewith, under the seal of the said Superior Court, a stipulation of the parties to said proceedings, by which it is provided "that the transcript of record filed in the office of the clerk of the Supreme Court of the United States with the petition for Writ of Certiorari (No. 510 of October Term 1921) be taken as the return to said Writ dated the nineteenth day of November 1921."

In testimony whereof I, Francis A. Campbell, Clerk of said Superior Court, have hereto set my hand and the seal of said Court this twenty-ninth day of December, A. D. 1921.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

[Endorsed:] (14) File No. 28,465. Supreme Court of the United States, October Term, 1921. No. 510. Donald M. Hill et al., Executors, etc., vs. Charles S. Smith. Writ of Certiorari. Suffolk Clerk's Office. Filed Dec. 20, 1921. Francis A. Campbell, Clerk Superior Court.

49 [Endorsed:] File No. 28,465. Supreme Court U. S., October Term, 1921. Term No. 510. Donald M. Hill et al., Executors &c., P. E., vs. Charles S. Smith. Writ of certiorari and return. Filed Jan. 3, 1922.

(5824)

SEP 9 1932

JAMES B. MATTER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. [redacted]164

DONALD M. HILL, ET ALS.,
Petitioners,

v.

CHARLES S. SMITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF PETITION.

EDWARD E. BLODGETT,
IRVING F. CARPENTER,
GEORGE S. FULLER,
Counsel for Petitioners.

St. Louis, Law Printing and Blank Book Co.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 510

DONALD M. HILL, JAY R. BENTON AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS,

v.

CHARLES S. SMITH, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Donald M. Hill, Jay R. Benton and George B. Billings, Executors of the will of Warren M. Hill, respectfully petition this Court for a writ of certiorari to require that there be certified to this Court for review and determination the cause, the record of which remains in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, numbered 79,103, wherein your Petitioners were the defendants and the Respondent was the plaintiff, and wherein final judgment has been entered pursuant to a decision of the Supreme Judicial Court for the said Commonwealth reported in Volume 232 of the Massachusetts Reports, page 188.

This action was brought by your Respondent in the

said Superior Court for the County of Suffolk and Commonwealth of Massachusetts by a writ dated March 30, 1914, on a judgment for $4,478 secured by him on the second day of May, 1904, against Warren M. Hill (your Petitioners' testator), late of Boston, Massachusetts. The cause of action upon which the judgment had been founded did not appear. The defendant's answer set up a discharge in bankruptcy ordered by the District Court of the United States for the District of Massachusetts on the third day of December, 1912, discharging the said Warren M. Hill from all provable debts and claims which existed on the twentieth day of June, 1912, on which day the petition for adjudication had been filed by him; excepting such debts as were by law excepted from the operation of a discharge in bankruptcy.

After the commencement of the suit and before the trial the said Warren M. Hill died (October 26, 1915) and your Petitioners were cited in by your Respondent (the original plaintiff) as defendants. Your Respondent having proved the judgment and that it remained unsatisfied, rested. Your Petitioners (the defendants) introduced in evidence a certified copy of the discharge in bankruptcy of the said Warren M. Hill and rested. Your Respondent (the plaintiff and judgment creditor) then introduced in evidence in rebuttal a certified copy of the schedule of creditors filed in the bankruptcy proceedings of said Warren M. Hill in which schedule the name of your Respondent, Charles S. Smith, did not appear. No evidence other than the foregoing was introduced by either party.

The Superior Court ruled, at the request of your Petitioners, as follows:—

(1) That the certified copy of the discharge in bankruptcy on the facts in this case was *prima facie* evidence that the plaintiff's (your Respondent's) debt was properly

scheduled and that the plaintiff was duly notified of the bankruptcy.

(2) That the burden was upon the plaintiff (your Respondent) to show that his debt or judgment was not scheduled according to law in the list of claims filed in the Bankruptcy Court prior to the discharge in bankruptcy.

(3) That in arriving at a finding in this case the Court must assume, unless by a preponderance of the evidence the plaintiff (your Respondent) had shown otherwise, that the bankruptcy proceedings of the defendant prior to and at the time of the adjudication of discharge were in all respects regular and in compliance with every requirement of the Bankruptcy Law.

(4) That the plaintiff's (your Respondent's) claim was a provable debt under the Bankruptcy Act.

Your Petitioners (the defendants) also requested the Superior Court to rule that the burden was upon the plaintiff to show that he was not notified of the proceedings in bankruptcy and that the burden was upon the plaintiff to show that he had no knowledge of the proceedings in bankruptcy. The Superior Court refused to make either of the foregoing rulings as requested and found for your Respondent (the original plaintiff) in the amount of $8,150.

The case was then taken to the Supreme Judicial Court for the Commonwealth of Massachusetts upon your Petitioners' exceptions to the finding of the Superior Court and to its refusals to rule as requested. The Supreme Judicial Court, however, overruled your Petitioners' exceptions and the case went back to the said Superior Court for the entry of final judgment.

Thereafter on the sixth day of June, 1921, final judgment was entered for your Respondent (the original plaintiff) in the said Superior Court for the County of Suffolk

pursuant to rescript from the Supreme Judicial Court for the Commonwealth of Massachusetts.

Your Petitioners are advised that the said judgment of the Superior Court for the County of Suffolk and Commonwealth of Massachusetts is final and erroneous and this Honorable Court should require the case to be certified to it for its review and determination.

The reasons relied on by your Petitioners for the issuance of said writ and upon which your Petitioners believe that this petition ought to be granted may be summarized as follows: —

First: — The Massachusetts Supreme Judicial Court in overruling your Petitioners' exceptions to the refusal of the Superior Court to rule that the burden was upon your Respondent (the original plaintiff and the creditor) to show that he was not notified and that he had no knowledge of the debtor's proceedings in bankruptcy, holds that a discharge in bankruptcy of the debtor having been proved and the creditor having proved that his name did not appear in the bankrupt's schedule of creditors, the burden was then cast upon the debtor to show that the creditor had notice or knowledge of the proceedings in bankruptcy. This is in conflict with the Bankruptcy Law, as construed by this Court, under which the burden is upon the creditor (the debtor's discharge in bankruptcy having been proved in defense to a provable debt) to show that the "debt sued on was by law excepted from the operation of the discharge".

Second: — The decision of the Massachusetts Supreme Judicial Court in overruling your Petitioners' exceptions to the finding and refusals to rule as requested and the rendering of final judgment by the Superior Court in favor of your Respondent (the original plaintiff) upon his claim, the claim being upon a judgment secured by him

in 1904 against your Petitioners' testator, and the only evidence before the said courts being (in addition to the proof of the judgment and that it remained unsatisfied) a certified copy of a discharge in bankruptcy of the judgment debtor granted in 1912 and a certified copy of the schedule of creditors filed in said bankruptcy proceedings in which schedule the name of your Respondent, Charles S. Smith, did not appear, were erroneous and in conflict with the Bankruptcy Law, as construed by this Court, and was a denial of the rights, privileges and immunities to which the debtor (your Petitioners' testator) was entitled under the said Bankruptcy Law.

Third: — The decision of the Massachusetts Supreme Judicial Court, which appears to be in conflict with the decisions of other State courts and with the decisions of this Court upon the question of the effect to be given to a discharge in bankruptcy, leaves debtors and creditors in doubt as to the effect on their liabilities and rights of a discharge in bankruptcy granted to the debtor under the Bankruptcy Law. In view of this conflict the existence of which has been recognized by this Court in the recent case of *Kreitlein* v. *Ferger,* 238 U. S. 21 at pages 30 and 31, it is in the interests of jurisprudence and uniformity of decisions that the questions raised by this case involving the construction and application of the Bankruptcy Law be finally determined by this Court.

Your Petitioners present, herewith, a certified copy of the entire record in the said cause including the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts.

Wherefore your Petitioners respectfully pray that a writ of certiorari be issued to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law and that the said decision of the

Supreme Judicial Court for the Commonwealth of Massachusetts and the judgment of the Superior Court for the County of Suffolk in said Commonwealth be reversed by this Honorable Court and that your Petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

DONALD M. HILL,
JAY R. BENTON AND
GEORGE B. BILLINGS,

EXECUTORS OF THE WILL OF WARREN M. HILL,
by their Counsel,

EDWARD E. BLODGETT.
IRVING F. CARPENTER.
GEORGE S. FULLER.

COMMONWEALTH OF MASSACHUSETTS.
COUNTY OF SUFFOLK, SS.

Edward E. Blodgett, being duly sworn, deposes and says that he is the counsel for the above-named Petitioners and that the matters in the foregoing petition are true to the best of his knowledge, information and belief.

Subscribed and sworn to before me this first day of September, 1921.

[SEAL] NORMAN W. BINGHAM, JR., *Notary Public.*

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

EDWARD E. BLODGETT,
Counsel for the Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 510

DONALD M. HILL, JAY R. BENTON AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS.

v.

CHARLES S. SMITH, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A statement of facts is contained in the petition to which this brief is annexed. For clearness and convenience your Petitioners, whenever referred to herein, are called the debtor, and your Respondent the creditor. The italics throughout this brief are ours.

A.

AUTHORITY FOR THE ISSUANCE OF THE WRIT.

This case involves the construction of the Bankruptcy Law (so-called) — and particularly of Sections 17 and 21 f thereof, and the only question now raised is whether the Superior Court and the Supreme Judicial Court of Massachusetts gave the proper effect to the discharge in bankruptcy pleaded by the debtor (your Petitioners' testator). This clearly presents a Federal question.

Crawford v. *Burke*, 195 U. S. 176, 186.
Kreitlein v. *Ferger*, 238 U. S. 21.
Neal v. *Clark*, 95 U. S. 704.

This Federal question, *i. e.*, as to the proper effect to be given to a discharge in bankruptcy pleaded by the debtor, was raised both in the trial Court (Superior Court) and in the Supreme Judicial Court of Massachusetts. In the trial Court the debtor pleaded his discharge in bankruptcy as a bar to the creditor's claim and requested certain rulings as to the burden of proof based thereon, duly excepting to the refusal to give such rulings and to the finding for the creditor made by the said Court. And again before the Supreme Judicial Court the debtor raised the same question, and that Court considered and determined the Federal question thus involved, as appears from its opinion (232 Mass. 188) a copy of which is included in the transcript of the record.

This case is properly reviewable by this Court on a writ of certiorari for the reasons that the questions raised relate wholly to an alleged denial by the Superior Court and the Supreme Judicial Court of Massachusetts of certain rights, privileges or immunities asserted by the debtor under the Bankruptcy Law, and this petition may be properly allowed under Section 237 of the Judicial Code, Act of September 6, 1916, c. 448, 39 Stat. at Large 726.

Gratiot State Bank v. *Johnson*, 249 U. S. 246.
Chicago, Great Western R. R. v. *Basham*, 249 U. S. 164.
Andrews v. *Virginian Ry. Co.*, 248 U. S. 272.
N. Y. Central & Hudson River R. R. v. *York & Whitney Co.*, 41 Sup. Ct. Rep. 509.

The question raised in the case at Bar was expressly referred to in the *Kreitlein* case at pages 30–31 but was not passed upon, this Court saying with respect to it as

follows:— "The authorities, however, differ as to whether under Section 17 (3) the burden is on the plaintiff (the creditor) to show he had notice or on the bankrupt to show that the creditor had notice in time to have proved his claim and had it allowed."

B.

THE MASSACHUSETTS SUPREME COURT DID NOT GIVE THE PROPER EFFECT TO THE DEBTOR'S PLEA OF A DISCHARGE IN BANKRUPTCY.

I.

The decision of the Massachusetts Supreme Court apparently is based upon the theory that the burden of *proof* remained throughout upon the debtor to prove that the debt sued upon by the creditor came within the operation of his (the debtor's) discharge in bankruptcy and that the introduction in evidence of the debtor's discharge in bankruptcy was merely prima facie evidence in favor of the debtor to the effect that the creditor's claim has been discharged, which prima facie evidence merely shifted to the creditor the burden of evidence. Such a theory is fundamentally wrong.

A. Section 17 of the Bankruptcy Law (Act of July 1, 1898, c. 541, Stat. at L. 544) as amended by the Act of February 5, 1903, c. 487, 32 Stat. at L. 797 (this case arose prior to the Amendment of 1917) provided as follows:—

> "*Debts Not Affected by a Discharge.*
>
> Sec. 17a A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; . . ."

B. Section 21 f of the Bankruptcy Law provides as follows:

> " A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidenee of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made."

C. A plea of a discharge in bankruptcy is a plea in bar.

21 Ruling Case Law, Pleading, Sec. 109 and cases cited.

D. It is not an unconscionable or odious defense to an action to recover a debt and has been referred to as being similar to the defense of the statute of limitations.

Citizen's Nat'l Bank v. *Branden,* 19 N. D. 489.

E. Such a plea shifts to the creditor, if he would avoid it, the burden of *proof.* The only burden of *proof* upon the debtor who has pleaded his discharge in bankruptcy is to prove that discharge. That burden is completely sustained by the introduction of a duly authenticated copy of the order for his discharge. The burden of *proof,* not merely the burden of evidence, is thereupon placed upon the creditor, if he would avoid the plea by any exception in the statute, to establish that he comes within that exception.

(1) Such is the clearly established doctrine where the statute of limitations is pleaded.

Piatt v. *Vattier,* 9 Pet. 405, 416.
Ross v. *Duval,* 13 Pet. 45.
Marsteller v. *M'Clean,* 7 Cranch, 156.
Pierce v. *Perry,* 189 Mass. 332.

(2) Such a doctrine should also apply where a discharge in bankruptcy is relied upon.

(a) One of the main purposes of the bankruptcy stat-

ute like that of statutes of limitations is the quieting of litigation with respect to debts within the scope of such statutes and the relief of such debtors.

(b) Such a result was reached in the *Kreitlein* case although without reference to the analogy to the case where the statute of limitations is pleaded — the court holding that "the introduction of the order makes out a *prima facie defense*" (note that this Court used the word *defense* rather than the word *evidence*).

F. The creditor in the case at bar must rely upon the exception created by clause (3) of Section 17 of the Bankruptcy Law in order to avoid the effect of the operation of the debtor's discharge in bankruptcy. That clause clearly creates only one class of debts which may be so excepted.

G. "In view of the well known purposes of the Bankruptcy Law, exceptions to the operation of a discharge should be confined to those plainly expressed."

Gleason v. *Thaw*, 236 U. S. 558, at 562.

H. This Court, in the *Kreitlein* case, has definitely established that the burden is upon the creditor to show that "the debt sued upon was by law excepted from the operation of the discharge".

I. Not all, but only certain, unscheduled debts are thus excepted by clause (3) from the operation of a discharge. See *Delta County Bank* v. *McGranahan*, 37 Wash. 307, 309. In order to bring a debt within the class excepted by said clause (3) from the operation of a discharge at least four distinct facts must appear, viz.: —

(1) That the debt was not duly scheduled in time for proof and allowance with the name of the creditor;

(2) That the creditor's name was known to the bankrupt;

Morency v. *Landry*, 79 N. H. 305, 108 Atl. 855;
Steele v. *Thalheimer*, 74 Ark. 516;

(3) That the creditor had no notice, and

(4) That the creditor had no actual knowledge of the bankruptcy proceedings.

Laffoon v. *Kerner*, 138 N. C. 281.
Manheim v. *Loewe*, 173 N. Y. Supp. 260.
Re Peterson, 121 N. Y. Supp. 738; 137 App. Div. 435.
Thompson v. *Caverley*, 148 Ill. App. 295 (semble).

J. The burden being upon the creditor in the case at bar to show that the debt sued upon came within the class of debts excepted by clause (3) from the operation of the discharge, and there being at least four essential facts which must appear in order to bring a debt within said clause (3), it follows that the creditor has the burden of establishing or at least of going forward with the evidence to establish each of those four essential facts, and he certainly cannot be held to have sustained that burden by showing, as in the case at bar, only one of those facts.

(1) In the case of *Morency* v. *Landry, supra*, it appeared that the debt was not scheduled under the name of the creditor, J. A. Morency, but no evidence was offered as to whether the bankrupt knew Morency's relation to him as a creditor. The court held that the Bankruptcy Law as construed by this Court imposed upon the creditor the burden of showing that the bankrupt knew Morency's relation to him as a creditor. It should also be noted that, although the lower court in that case *had found* that the creditor *had actual* knowledge, yet

the validity of that finding was one of the questions which was also apparently open on the appeal and the New Hampshire Supreme Court expressly left that question out of consideration and ignored that finding, saying that their conclusion on the question of burden of offering evidence as to the debtor's knowledge of the creditor's name rendered it "unnecessary to consider whether the mailing of notices to F. Morency and F. Morency & Co. authorized the finding that J. A. Morency (the creditor) had actual knowledge of the proceedings".

(2) In the Peterson case (*supra*) the question was whether, a discharge in bankruptcy having been shown, it was necessary for the debtor to show that the claims were *not* excepted from the operation of the discharge and the court, in holding that such burden was *not* upon the debtor but upon the creditor, said: "'In order to defeat the discharge . . . the burden was upon the plaintiff (the creditor) to establish by sufficient evidence and an appropriate finding that its claim was one of those excepted from the effect of a discharge.' . . . If the appellants (the creditor) claimed their debts were excepted because not properly scheduled, *and* they had no notice or knowledge . . . they had the burden of showing the *facts* upon which their claim rested."

(3) In the case of *Manheim* v. *Loewe* (*supra*), action was brought upon two promissory notes which came due in 1908. The debtor produced a certified copy of his discharge in bankruptcy which had been granted him in 1912 and rested. No evidence was offered either as to the schedules or as to notice and the court held that "the burden of proof was upon the creditors to show that their claim was

not properly scheduled *and* they did not have notice of the bankruptcy proceedings."

(4) In the cases of *Laffoon* v. *Kerner* (*supra*), *Larsen* v. *Hyman*, 126 N. Y. Supp. 100, and *re Peterson's Est.*, 124 N. Y. Supp. 907, the debtor in each instance rested after having proved his discharge in bankruptcy, and there was no evidence either as to the schedules or as to notice and the court, in making the same holding as in *Manheim* v. *Loewe* (*supra*), used substantially the same language as that quoted in the preceding paragraph.

(5) In so far as the opinion in the case of *Bailey's Adm.* v. *Gleason*, 76 Vt. 115, is contrary to rules laid down in the cases above referred to, it must be considered as in effect overruled by the *Kreitlein* case. The Vermont case, although recognizing the general rule that the burden is not upon the debtor to show that the debt is not within any of the excepted classes and that it is for the creditor by his replication to bring the debt within some exception, nevertheless attempts to attribute a different character to the class of debts covered by clause (3) and establish an exception as to that class from such general rule by holding in effect that a debtor in pleading a discharge in bankruptcy must also make such allegations as will show either that the debt was duly scheduled or that the creditor had knowledge of the proceedings. In the *Kreitlein* case not only did this Court say that, upon the introduction by the debtor of the order for discharge, the burden is "then cast upon the plaintiff (the creditor) to show that, because of *failure to give notice* or other statutory reason, the debt sued upon was by law excepted from the operation of

the discharge", but this Court also pointed out that the debtor in that case had *unnecessarily* offered in evidence the schedule to show that the creditor was listed.

(6) That the burden should be on the creditor to establish *all* the facts necessary to bring his claim within the class of debts excepted by clause (3) from the operation of the debtor's discharge in bankruptcy, would seem to follow from the principle laid down in the case of *Marsteller* v. *McClean*, 7 Cranch. 156, where it was held that a plaintiff who sought to avoid a plea of the statute of limitations must set forth in his replication "a full and complete answer to the bar". In that case the time prescribed by the statute of limitations was five years. The plaintiff was a feme covert at the time the cause of action. The Court held the replication bad because it did not *also* allege that that plaintiff had continued a feme covert until within five years of the date when suit was brought.

K. That the burden should be upon the creditor to show that his claim is excepted by law from the operation of the discharge is the obvious conclusion from a study of the history and purposes of the Bankruptcy Law as shown in the various decisions of this Court construing said Law.

(1) The policy of the Bankruptcy Law "was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities and enable him to take a fresh start". The decisions of this Court "lay great stress upon this feature of the law".

Stellwagen v. *Clum*, 245 U.S. 605 at 617.
Traer v. *Clews*, 115 U.S. 528 at 541.

Burlingham v. *Crouse,* 228 U. S. 459 at 473.
Wetmore v. *Markoe,* 196 U. S. 68, 77.

(2) The rule thus established, placing the burden on the creditor to show that his claim is excepted from the operation of the discharge, is "consonant with equity and consistent with the object and intention of Congress in enacting" the Bankruptcy Law. "A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system."

cf. *Neal* v. *Clark,* 95 U. S. 704 at 709.

(3) The purpose of Section 17 of the present Bankruptcy Law was to confer upon creditors the *benefit* of having certain classes of debts excepted from the operation of the discharge.

Friend v. *Talcott,* 228 U. S. 27 at 38–40.

(4) Clause (3) of said Section 17 is devoted to defining only one class of debts which are excepted from the operation of a discharge. In defining that class it starts in by referring to a general class of debts, *i. e.*, debts not scheduled with the name of the creditor, but then it limits that general class by adding the two qualifications or exceptions, first, that the name of the creditor must be known to the bankrupt and second, that the creditor must have had no notice or actual knowledge of the bankruptcy proceedings. Unless those exceptions are negatived clearly the debt cannot be said to have been brought within the class of excepted debts created by said clause (3).

(5) It is a well established rule of statutory construction that where a statute creates a right or rights and certain exceptions are made in the clause creat-

ing such rights, the burden is upon the party claiming such a right not only to plead the statute but also the facts negativing the exception.

Black, Interpretation of Laws, p. 429.
Sedgwick, Construction of Statutes and Constitutional Law, 2nd Ed. pp. 50, 93.
Potter's Dwarris on Statutes, p. 119.
Lewis' Sutherland, Statutes and Statutory Construction, 2nd Ed. Sec. 351 (p. 671).

(a) In our case the debtor having pleaded and proved his discharge in bankruptcy, such a plea being a plea in bar, the burden is upon the creditor to establish that his debt is excepted by law from the operation. To do so he must rely on clause (3) of Section 17 and claim thereunder his right to recover against the debtor. But the clause of the statute creating his right contains certain exceptions. Under the well established rule above cited he has not established that his debt comes within the class of debts excepted by clause (3) from the operation of the discharge until he has pleaded or shown the facts negativing the exceptions contained in clause (3) — to wit, the debtor's knowledge of the creditor's name *and* the creditor's lack of notice or actual knowledge of the bankruptcy proceedings.

(b) It is a well established rule of evidence that where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative.

10 Ruling Case Law, Evidence, Sec. 49.
Freeman v. *Blount*, 172 Ala. 655.

II.

The trial Court erred in finding that the creditor was entitled to recover against the debtor in this case and in entering final judgment pursuant to such finding.

A. There being only one class of debts excepted by clause (3) of Section 17 from the operation of the discharge and the burden being upon the creditor to show that his debt came within that class, the trial Court making that finding must have presumed,

(1) That the debtor knew the name of the creditor and knowingly failed to schedule the debt in that name;

(2) That the creditor had no notice, and

(3) That the creditor had no actual knowledge of the proceedings in bankruptcy.

B. The first of such presumptions is clearly improper in this case.

(1) Such a charge must be proved by the party making it (the creditor), for a person shall be presumed innocent until he is proved guilty.

10 Ruling Case Law, Evidence, Sec. 49.
1 Greenleaf, Evidence, Secs. 78, 81.

(2) The record in this case does not furnish evidence sufficient to warrant any such finding. The debtor merely failed to schedule the name of the creditor. There is no evidence that he knew the creditor's name. It does not even appear that the debt was not scheduled, and it might well have been the fact in the case at bar that, as this Court pointed out in the *Kreitlein* case, the debt was in fact scheduled in the form of a liability "rather than as a judgment into which the liability had been merged".

C. Such presumptions are contrary to the spirit and purpose of the Bankruptcy Law.

(a) The provision of the law relating to the discharge of bankrupts should *not* be construed against the bankrupt nor should all implications and doubts be resolved against him, for the release of the unfortunate and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and of the general public is one of the main, if not the most important, objects of the law.

Hardie v. *Swafford Bros. Dry Goods Co.*, 165 Fed. 588 (C. C. A. 5th Cir.)

See also *Burlingham* v. *Crouse*, 228 U. S. 459 at 473.

" " *Wetmore* v. *Markoe*, 196 U. S. 68 at 77, where the Court said: "The Bankruptcy Law should receive such an interpretation as will effectuate its beneficent purposes. . . ."

D. Such presumptions are contrary to the Bankruptcy Law itself.

(a) As pointed out above, Section 17 confers upon the creditor the benefit of certain exceptions and therefore has been construed as placing upon the creditor the burden of bringing his debt within one of the classes therein described. In the case at bar the creditor must bring his debt within clause (3) of Section 17 and it follows that it must be his duty to prove, or at least go forward with the evidence to show, the facts necessary to negative the exceptions *contained* in said clause (3). Therefore it must be held to be contrary to the Bankruptcy Law for any court to presume, in favor of the creditor, merely from the fact that the creditor's name did not appear in the schedules, any of the other

three facts which the creditor must also show in order to make out his case, *i. e.*, to show that his debt is excepted from the operation of the discharge. To hold otherwise would in effect be a denial of the rule that the burden was upon the creditor to bring his debt within the excepted class, for to bring it within that class (if relying on said clause (3)) at least four distinct facts must appear (see paragraph *I* under Division B on pages 11-12 above) and it certainly would be taking two inconsistent positions to hold that the burden is upon the creditor to bring his debt within a class to do which at least four essential facts must be made to appear, and then at the same time hold that the creditor need offer evidence of only one of those facts and that the other three essential facts may be presumed from that one fact.

E. The presumption, if any, in the case at bar, is that the creditor *did* have notice or actual knowledge of the bankruptcy proceedings.

(a) Section 21 f of the Bankruptcy Law creates a statutory presumption as to the regularity of the proceedings, and it has been held that under this section it would be presumed that the debts were property scheduled *and* that the creditors had notice.

Re Peterson, 121 N. Y. Supp. 738 at 740; 137 App. Div. 435 at 438.

(b) Where the burden is on a party to prove a material fact peculiarly within his knowledge and he fails without excuse to testify, the presumption arises that his testimony if introduced would be adverse to his contention.

10 *Ruling Case Law, Evidence*, Secs. 36 and 53, and cases cited.
West v. *Kern*, 88 Ore. 247.

(c) In this case the material fact was a negative fact. If the creditor had no notice or actual knowledge of the bankruptcy proceedings no one could know that fact better than the creditor himself. Such a negative fact was peculiarly within the knowledge of the creditor. If he had had no such notice or actual knowledge he could easily have testified to that effect. It is, therefore, only the natural and fair presumption that he in fact did have such notice or actual knowledge else he would have denied it. (In this connection it must be borne in mind that nothing in the creditor's Affidavit of No Defense appearing on page 7 of the Transcript of Record can be considered as evidence in favor of the creditor in this case — see Massachusetts Acts of 1911, c. 305 (in force at the time of the trial). Nor is such an affidavit a pleading. It is merely a statement of reasons which a plaintiff, desiring a speedy trial, may file and is considered only on the question of whether the case should be advanced on the trial list. Furthermore the bill of exceptions shows that it was not considered by either the Superior Court or the Supreme Judicial Court of Massachusetts.)

(d) That there should be such a presumption of notice or actual knowledge would seem to be so even if this Court should, following the reasoning of the Massachusetts Supreme Court in the case at bar, rule that the ultimate burden of *proof* was upon the debtor to show that the debt sued upon was discharged, for this Court in the case of *Selina*,

Rome and Dalton R. R. v. *U. S.*, 139 U.S. 560 at 567, has established an important exception to such a general rule as to burden of proof where, from the very nature of the question in dispute, the evidence that could be adduced respecting it (the fact to be established) must be in the possession of, or easily attainable by, one of the contending parties, who accordingly could at once put an end to the litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established "as a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies peculiarly within his knowledge, or of which he is supposed to be cognizant".

(e) In view of the presumption created by Section 21 f as to the regularity of the proceedings it must be held in the case at bar that the notice of the first meeting of creditors was duly published as provided by Section 58 b of the Bankruptcy Law. Therefore, in view of the creditor's failure to deny, either in his pleadings or by his testimony, that he had no notice or actual knowledge of the proceedings, it would be the natural and reasonable presumption that, having had at least constructive notice through such publication, he had had "notice" within the meaning of that word as used in Clause (3) of Section 17. And right here it should be noted that Congress in enacting the Bankruptcy Law apparently did not see fit to qualify or limit the word "notice" in that Clause (3) although it did qualify

or limit the word "knowledge" in the same clause to "actual knowledge".

C.

THERE APPEARS TO BE A CLEAR CONFLICT BETWEEN THE DECISIONS OF STATE COURTS AS TO THE QUESTIONS RAISED IN THE CASE AT BAR.

I.

The cases supporting the view that the burden is upon the creditor to show *all* the facts necessary to bring his debt within the class excepted by Clause (3) of Section 17 from the operation of the debtor's discharge in bankruptcy appear to have been based upon sounder reasoning and are more consistent with the purpose of the Bankruptcy Law than the cases opposed to that view.

A. It is submitted that the case of *Morency* v. *Landry*, 79 N.H. 305, 108 Atl. 855, is the best considered and soundest of the various State court cases in which the question of burden of proof under clause (3) of Section 17 is considered, and is a direct authority (although the facts are not on all fours with those in the case at bar) to the effect that the burden is upon the creditor to show *all* the facts necessary to bring the debt within the class of debts excepted by said clause (3) from the operation of a discharge.

(1) In that case the creditor was the payee of a note which had been signed by the debtor, which note had been discounted at a bank, and the bank having recovered judgment against both the creditor and debtor the creditor had paid the judgment in 1902. In 1906 the debtor went into bankruptcy and in 1912 received his discharge. About 1918 the creditor filed his claim against the estate of the debtor, then deceased. The debtor's discharge having been shown, it appeared that the creditor's name did not appear in the debtor's schedules but

there was no evidence as to whether the debtor knew the creditor's relation to him as a creditor. The court after citing the case of *Stellwagen* v. *Clum*, 245 U. S. 605, at 617, as to the purpose of the Bankruptcy Law and the *Kreitlein* case, expressly held that the Bankruptcy Law, as construed by this Court, imposed upon the creditor the burden of offering evidence tending to show that the debtor, when he filed his petition, knew the creditor's relation to him as a creditor.

(2) Furthermore the court expressly declared that in view of that conclusion it was unnecessary for it to consider whether the evidence in the case authorized the finding, which the lower court had made, that the creditor had actual knowledge of the proceedings.

B. In each of the following cases the court in its opinion clearly points out that the burden is upon the creditor to allege or show, not only that the debt was duly scheduled with the name of the creditor, but also that the debtor knew either the facts necessary to enable him to so schedule it or that the creditor had no knowledge of the bankruptcy proceedings, or both.

(1) In *Steele* v. *Thalheimer*, 74 Ark. 516, the court, in holding that the creditor was barred by the debtor's discharge in bankruptcy notwithstanding the creditor's contention that he had no notice and that his address had not been correctly given, said: "The act . . . excepts only those (debts) which have not been duly scheduled in time . . . with the name of the creditor, if known to the bankrupt . . , besides it is not alleged or shown that the bankrupt knew the address of the creditor, or that the failure to give his correct address was intentional or fraudulent."

(2) In *Laffoon* v. *Kerner*, 138 N. C. 281, the court says: "The creditor may notwithstanding (the discharge) show that his debt is of the excepted class. The onus, however, is on him and if he fails to make the proof, the debt will be taken to (be) one of an ordinary character. . . ." The court after disapproving one of its early decisions (*Balk* v. *Harris*, 130 N. C. 381) in so far as that decision said that the debtor must show that the debt was scheduled *or* that the creditor had notice, goes on to say: "We are of the opinion that the burden was upon the plaintiff (the creditor) to show that his debt was not scheduled *and* that he had no notice of the proceedings in bankruptcy."

(3) In *Manheim* v. *Loewe*, 173 N. Y. Supp. 260 (185 App. Div. 601), the court, after disapproving *Graber* v. *Gault*, 93 N. Y. Supp. 76, 103 App. Div. 511, and referring to *Hyde Park Flint Bottle Campany* v. *Miller*, 179 App. Div. 73, as being inconsistent with the *Kreitlein* case, said: ". . . the burden of proof is upon the creditors to show that their claim was *not* properly scheduled *and* they did not have notice of the bankruptcy proceedings."

(4) In *Bank of Lafayette* v. *Phipps*, 101 S. E. 696 (Ga. App.), the court held that there was no error in directing a verdict for the debtor who had introduced a certified copy of his discharge in bankruptcy, ". . . there being no insistence upon the part of the plaintiff (the creditor) that it did not have notice or actual knowledge — or that the debt and the name of the creditor were not scheduled".

(5) In *Re Peterson*, 121 N. Y. Supp. 738; 137 App. Div. 435, the court in determining the question whether it was necessary for the debtor to show

that the debts were not excepted from the operation of the discharge, and there being no proof as to the schedules or notice, said: "If the appellants (creditors) claimed their debts were excepted because not properly scheduled *and* they had no notice or knowledge — they had the burden of showing the *facts* upon which their claims rested."

(6) In *Alling* v. *Straka,* 118 Ill. App. 184, the court said: ". . . If the debt sued on falls within one of the exceptions of the bankruptcy act it is a matter of reply for the plaintiff (the creditor) to make. The burden is upon her to prove it. The burden of proof should follow the pleadings."

C. None of the decisions in the cases cited by the Massachusetts Supreme Court as supporting its opinion in the case at bar appear to have been based upon any consideration of the history or purposes of the Bankruptcy Law as heretofore set forth and referred to by this Court in the cases heretofore cited in this brief.

(1) In *Wineman* v. *Fisher,* 135 Mich. 604, the court in holding that the debtor had the burden of proving that the creditor had no notice or knowledge where it appeared that the debt was not scheduled, apparently based its opinion entirely upon Potter's Dwarris, Statutory Const. 119; Sedgwick, Statutory Construction, 2nd ed. p. 93, and 1 Chitty Crim. Law, p. 223, evidently proceeding upon the theory that the purpose of Section 17 of the Bankruptcy Act was to confer upon or grant to a debtor the benefit of having certain of his debts discharged as a result of his bankruptcy proceedings. That such a theory is unsound is clear from the opinion of this Court in the case of *Friend* v. *Talcott, supra.* In the *Talcott* case this Court pointed

out that the purpose of Section 17 was to confer upon certain creditors the right or benefit of having certain debts excepted from the operation of the discharge. That being so the citations in the *Wineman* case would seem to be directly contrary to the holding for which they are cited, for they declare that where a statute creates a right or rights and certain exceptions are made therein, the burden is upon the party claiming such a right to negative such exceptions.

(2) The case of *Armstrong* v. *Sweeney,* 73 Neb. 775, was a proceeding brought by the debtor to restrain the sale of his goods on execution. In his petition he alleged not only the discharge but also that the creditor had knowledge of the bankruptcy. The court, in holding that the debtor had not established that the creditor had knowledge apparently based its decision upon the pleadings in the case, saying: "The burden of proof was upon the plaintiff to sustain the allegation of his petition that Hall (the creditor) had knowledge of the bankruptcy proceedings in time to prove his claim." No citations were given, and there was no reasoning in the opinion indicating how the court arrived at its conclusion.

(3) In *Collins* v. *Crews,* 3 Ga. App. 238, the debtor had alleged in his answer that the creditor had actual notice of the proceedings, and in holding that the debtor had failed, on the evidence, to prove such notice, said: "The defendants (the debtors) ***having assumed the burden*** (of proving notice) the issue in the case turned on whether they could disprove the testimony of Crews and show that Crews had knowledge." No authority was

cited and here again the question as to burden of proof apparently was made to depend upon the pleadings.

(4) The case of *Sloan* v. *Grollman*, 113 Md. 192, was a proceeding by the debtor to restrain the enforcement by the creditor of a judgment. It appeared that the creditor's debt had not been scheduled. The complainant, the debtor, alleged that he had personally notified the creditor by mail but the creditor denied the allegation. The court, in holding that the debtor had not sustained the burden of proof, without apparently any consideration of the history or purposes of the Bankruptcy Act or the decisions of this Court with respect to it, based its decision upon the authority of the three preceding cases.

(5) The various Texas cases that appear to support the creditor's position in the case at bar are based on a line of decisions in that state which preceded the *Kreitlein* case and held, contrary to the *Kreitlein* case, that the burden was upon the debtor to show that the debt did not come within any of the exceptions to the operation of the discharge.

(6) The opinion in *Calmenson* v. *Moudry*, 137 Minn. 123, is based upon the preceding cases and the case of *Bailey's Adm.* v. *Gleason*, *supra*, which as pointed out above (see p. 14 of this brief) must be considered as in effect overruled by the *Kreitlein* case. The court merely states its conclusion without any reasoning, much less any consideration of the Bankruptcy Law as construed by this Court.

D. The cases of *Miller* v. *Guasti*, 226 U. S. 170, and *Birkett* v. *Columbia Bank*, 195 U.S. 345, are not helpful in the case at bar for in those cases the decisions, as pointed

out in the *Kreitlein* case, were based on extrinsic proof and on express findings that the debtor knowingly failed to properly schedule the debt and also that the creditor did not have notice or actual knowledge of the proceedings prior to the discharge of the bankrupt therein.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE PETITION SHOULD BE GRANTED AND A WRIT OF CERTIORARI ISSUED AS PRAYED FOR.

EDWARD E. BLODGETT,
IRVING F. CARPENTER,
GEORGE S. FULLER,
Counsel for Petitioner.

FILED
DEC 13 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 184.

DONALD M. HILL, JAY R. BENTON and GEORGE R. BILLINGS, Executors of the Will of Warren M. Hill, Petitioners,

v.

CHARLES S. SMITH.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

PETITIONERS' BRIEF.

EDWARD E. BLODGETT,
GEORGE S. FULLER,
IRVING F. CARPENTER,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 164.

DONALD M. HILL, JAY R. BENTON AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS,

v.

CHARLES S. SMITH, RESPONDENT.

BRIEF FOR PETITIONERS.

Pursuant to writ of certiorari granted by this Court there has been certified to this Court for review and determination the cause, the record of which remains in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, numbered 79103 wherein your Petitioners were the defendants and your Respondent was the plaintiff, and wherein final judgment was entered by said Superior Court pursuant to a decision of the Supreme Judicial Court for said Commonwealth reported in 232 Mass. 188.

For clearness and convenience your Petitioners, whenever referred to herein, are called the debtor, and your Respondent the creditor. The italics throughout this brief are ours.

This action was brought by Respondent (the creditor) in the said Superior Court for the County of Suffolk and

Commonwealth of Massachusetts by a writ dated March 30, 1914, on a judgment for $4,478 secured by him on the second day of May, 1904, against Warren M. Hill (your Petitioner's testator), late of Boston, Massachusetts. The cause of action upon which the judgment had been founded did not appear. The defendant's answer set up a discharge in bankruptcy ordered by the District Court of the United States for the District of Massachusetts on the third day of December, 1912, discharging the said Warren M. Hill from all provable debts and claims which existed on the twentieth day of June, 1912, on which day the petition for adjudication had been filed by him; excepting such debts as were by law excepted from the operation of a discharge in bankruptcy.

After the commencement of the suit and before the trial the said Warren M. Hill died (October 26, 1915) and your Petitioners were cited in as defendants. The creditor having proved the judgment and that it remained unsatisfied, rested. The debtor introduced in evidence a certified copy of the discharge in bankruptcy of the said Warren M. Hill and rested. The creditor then introduced in evidence in rebuttal a certified copy of the schedule of creditors filed in the bankruptcy proceedings of said Warren M. Hill in which schedule the name of the creditor, Charles S. Smith, did not appear. No evidence other than the foregoing was introduced by either party.

The Superior Court ruled, at the request of the debtor, as follows:

(1) That the certified copy of the discharge in bankruptcy on the facts in this case was prima facie evidence that the creditor's debt was properly scheduled and that the plaintiff was duly notified of the bankruptcy.

(2) That the burden was upon the plaintiff (the credi-

tor) to show that his debt or judgment was not scheduled according to law in the list of claims filed in the Bankruptcy Court prior to the discharge in bankruptcy.

(3) That in arriving at a finding in this case the Court must assume, unless by a preponderance of the evidence the plaintiff (the creditor) had shown otherwise, that the bankruptcy proceedings of the defendant prior to and at the time of the adjudication of discharge were in all respects regular and in compliance with every requirement of the Bankruptcy Law.

(4) That the plaintiff's (the creditor's) claim was a provable debt under the Bankruptcy Act.

The debtor also requested the Superior Court to rule that the burden was upon the creditor to show that he was not notified of the proceedings in bankruptcy and that the burden was upon the creditor to show that he had no knowledge of the proceedings in bankruptcy. The Superior Court refused to make either of the foregoing rulings as requested and found for the creditor in the amount of $8,150.

The case was then taken to the Supreme Judicial Court for the Commonwealth of Massachusetts upon the debtor's exceptions to the finding of the Superior Court and to its refusals to rule as requested. The Supreme Judicial Court, however, overruled the debtor's exceptions and the case went back to said Superior Court for the entry of final judgment.

Thereafter on the sixth day of June, 1921, final judgment was entered for the creditor (the original plaintiff) in the said Superior Court for the County of Suffolk pursuant to rescript from the Supreme Judicial Court for the Commonwealth of Massachusetts.

STATUTES.

The pertinent part of the Federal statutes involved in the consideration of this case are as follows:

A. Section 17 of the Bankruptcy Law (Act of July 1, 1898, c. 541, 30 Stat. at L. 544) as amended by the Act of February 5, 1903, c. 487, 32 Stat. at L. 797 (this case arose prior to the Amendment of 1917), which provided as follows:—

> *"Debts Not Affected by a Discharge*
>
> Section 17a. A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and allowance, **with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . .**"

B. Section 21f of the Bankruptcy Law, which provided as follows:

> "A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, **the regularity of the proceedings, and of the fact that the order was made.**"

ARGUMENT.

A.

STATEMENT OF THE POINT RAISED BY THIS CASE.

A. Starting with the basic principle which was clearly established by the case of *Kreitlein v. Ferger*, 238 U. S. 21, to wit: that the debtor having made out a prima facie defense by proving his discharge in bankruptcy, the burden then was cast upon the creditor "to show that . . . the debt sued on was by law excepted from the operation of the discharge"—the question raised by the record in this case boils down to this:

Can it be said that the creditor has sustained that burden by proving merely that his name did not appear in the debtor's bankruptcy schedule?

B. To sustain the judgment of the Massachusetts court in the case at bar will necessitate a holding by this Court that that question should be answered in the affirmative. There can be no escape from it. *The entire evidence is in the record* (see pp. 12–13 of the Transcript of Record). The creditor having proved that his judgment remained unsatisfied and the debtor having proved his discharge, the creditor "introduced in evidence in rebuttal a certified copy of the schedule of creditors *in which schedule the name of the plaintiff Charles S. Smith did not appear. No evidence other than the foregoing was introduced by either party.*" **Unless this court is willing to establish it as a rule of law that the fact that the name of a judgment creditor does not appear in the judgment debtor's schedules in bankruptcy is sufficient, in and of itself, to defeat the effect of the proof of the debtor's discharge in bankruptcy, then the judgment of**

the Massachusetts court in the case at bar cannot be sustained and must be reversed.

B.

STATEMENT OF THE FUNDAMENTAL PRINCIPLES INVOLVED IN CONSTRUING THE BANKRUPTCY ACT.

A. In the consideration of the various questions raised in this case and in construing the Bankruptcy Act, it should constantly be borne in mind that one of the main purposes of the Act is to provide a means whereby the unfortunate debtor may be relieved from the burden of hopeless insolvency.

Neal v. *Clark*, 95 U. S. 704.

Burlingham v. *Crouse*, 228 U. S. 459, where the court says at page 473:

> "It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among the creditors, and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the Act must be construed."

Stellwagen v. *Clum*, 245 U. S. 605, where the court says at page 617:

> "The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great

stress upon this feature of the law as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life."

Traer v. *Clews*, 115 U. S. 528 at 541.

B. The discharge of the debtor is one of the main, if not the most important, feature of the law.

Hardie v. *Swafford Bros. Dry Goods Co.*, 165 Fed. 588.

Stellwagen v. *Clum*, 245 U. S. 605, at 616.

C. And *particularly* should it be borne in mind that the exceptions created by Section 17 should be considered from the point of view that they were inserted in the act in order to *confer upon certain* classes of creditors *the benefit* of being excepted from the operation of the discharge.

Friend v. *Talcott*, 228 U. S. 27.

In this case White, C. J., after going somewhat into the history of the provisions of the former Bankruptcy Act as to excepting debts from the operation of the discharge, points out that the right which the present Bankruptcy Act *confers* upon enumerated classes of debts to be exempt from the operation of the discharge, does not rest upon the conception that such debts are exempt because they are excluded from the Act and may not participate in the distribution of assets. "The confusion lies in not distinguishing between creditors who are excluded from the Bankrupt Act and those who although included therein *have had conferred upon them the benefit of an exception from the operation of the discharge.*"

1. This point seems to have been overlooked in the opinion of the dissenting justices in the *Kreitlein* case.

2. It also seems to have been overlooked by the Massachusetts Supreme Court in this case for that court in its opinion said: "Since the discharge is for the benefit of the debtor and not of the creditor, there would seem to be a defect in the law if the burden of proving negative consequences arising from the default of the debtor should be borne by the creditor, and not by the debtor." But the whole Bankruptcy Act was created for the debtor, not merely the discharge. The discharge is a principal requisite of every true bankruptcy act. See *Stellwagen* v. *Clum* (*supra*) at 616. It was the creditor for whose benefit the exceptions in § 17 were created.

C.

THE MASSACHUSETTS SUPREME COURT CLEARLY ERRED IN SUSTAINING THE JUDGMENT OF THE LOWER COURT.

The two fundamental respects in which the Massachusetts courts erred were: (1) That they obviously presumed certain facts which were vital in order to warrant a judgment for the creditor, of which facts there is no evidence in the record; and (2) that the judgment of the creditor was based also upon the proposition that the burden was on the debtor in this case to show that the creditor had notice or actual knowledge of the bankruptcy proceedings.

The debtor respectfully submits that either of these errors is sufficient in itself to warrant this Court in reversing the judgment of the Massachusetts court and in holding that judgment ought to have been entered for the debtor.

I. As to the Erroneous Conclusion of Fact.

A. It is obvious that the Massachusetts court did presume either (a) that the debtor had failed to schedule *at all* the creditor's debt; or (b) that, assuming the debt had been scheduled, that the creditor's name was known to the bankrupt. One of those facts must have been found in order that the creditor's debt could come within clause 3 of Section 17 of the Bankruptcy Act and thus be excepted from the operation of the debtor's discharge. But the debtor insists that on the record as a matter of law *neither* of those facts could be found or presumed.

B. Paraphrasing a part of the opinion of the Supreme Court of the United States in the case of *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, at 611, and applying it to the case at bar as it comes up on the record, the debtor's position on this point is as follows:

> "It is insisted that there is no presumption that the debtor violated" the Bankruptcy Act by not duly scheduling the debt in question, "and that there is no evidence in the record to support such conclusion, and while it is conceded that ordinarily" upon writ of certiorari "to a state court, this court does not review the findings of fact, **yet it is insisted that in this case a Federal right has been denied, as the result of a finding of fact which is without support in the evidence**; that the evidence is before" this court "in the record by which that insistence may be tested; and that" the question whether or not this debt was duly scheduled "is a mixed question of law and fact so that **it is incumbent upon" this court "to analyze the evidence to the extent necessary** to give in the plaintiff in error (the debtor in this

case) the benefit of its asserted Federal right. **Such an insistence as to the power and duty of this court in such a case is well founded."**

See also *Creswill* v. *Knights of Pythias*, 225 U. S., 246, at 261.

C. The case came before the Massachusetts Supreme Court on the debtor's "exceptions to the refusals to rule, and to the finding". (See Transcript of Record p. 18.) The exception to the finding obviously raises the question whether the finding can be supported by the record. And this point is particularly raised by the following statement of the Massachusetts Supreme Court in the last paragraph of its opinion in this case: "The plaintiff met the prima facie proof made out by the discharge by proof from the record of the bankruptcy court *that his debt was not scheduled by the bankrupt.*" (Transcript of Record, p. 22.) But, the ~~creditor~~ debtor submits, the record shows that there was **no such proof.**

D. Whether the debt was *in fact* scheduled does not appear. There is no evidence in the record to support the conclusion that the debt was not scheduled. The **whole record as to this point** is contained in the 3rd paragraph of the Bill of Exceptions, which reads as follows:

> "The defendant introduced in evidence a certified copy of the discharge in bankruptcy of Warren M. Hill and rested. The plaintiff introduced in evidence in rebuttal a certified copy of the schedule of creditors in bankruptcy of Warren M. Hill in which schedule *the name* of the plaintiff Charles S. Smith did not appear. *No evidence other* than the foregoing was introduced by either party."
>
> (Transcript of Record, pp. 12–13.)

1. That Bill of Exceptions is all that the Massachusetts Supreme Court had before it. It does not state or even intimate that the debt was not scheduled. The statement that "no other evidence was introduced by either party" shows that there was no evidence on that point before the trial court.

2. The burden was on the creditor, and *not* on the debtor, to establish that the debt was not duly scheduled.

Kreitlein v. *Ferger*, 238 U.S. 21.
Manheim v. *Loewe*, 173 N. Y. S. 260; 185 App. Div. 601.
Re Peterson, 121 N. Y. S. 738; 137 App. Div. 435.

3. The first essential fact which it was the creditor's duty to establish *was that the debt was not duly scheduled*, with the name of the creditor if known to the debtor. To establish this there necessarily had to be evidence

either (1) that the debt was not scheduled at all
or (2) that it was not scheduled in the name of the creditor **and** that the name of the creditor was known to the debtor.

If it were a fact that the debt was not scheduled *at all*, the *only reasonable inference* is that the creditor would have seen to it that the Bill of Exceptions so stated rather than state the mere fact that his name did not appear in the schedules—**i. e. only the first element of (2)—leaving the record showing that there was no evidence as to the second element of (2).**

a. The Bill of Exceptions as a matter of law conclusively established what the evidence was in the trial court. Also the creditor in this case, by the endorsement by his attorney of record of his consent to the Bill of Exceptions, expressly approved that

Bill of Exceptions as fully stating the case as it was tried.

(Transcript of Record, p. 14.)

b. The creditor was charged with knowledge of the law that the introduction of the order of discharge cast upon him (the creditor) the burden of showing that his debt was excepted from the operation of the discharge, particularly as the decision in the *Kreitlein* case was handed down by this court on June 1, 1915, and the trial of the case at bar did not take place until November 15, 1917.

(Transcript of Record, p. 11.)

4. If there is any presumption of fact to be made at all in this case it should be that the debt *was* duly scheduled.

Bankruptcy Act, Section 21f.

Niles v. *Havens*, 190 N. Y. S. 656; 198 App. Div. 546, where the court says that upon proof of the bankrupt's discharge the presumption is "that the bankrupt's debts were scheduled properly. . . ."

Re Peterson, 121 N. Y. S. 738; 137 App. Div. 435, where the court, referring to Section 21f, says: "Under this provision it would be presumed that the debts in question were scheduled properly.

Manheim v. *Loewe*, 173 N. Y. S. 260; 185 App. Div. 601.

Larsen v. *Hyman*, 126 N. Y. S. 100.

a. "Experience teaches us that things are generally rightly done. That to do things wrongly is the exception, not the rule. Therefrom certain convenient and lenient legal presumptions arise and are universally indulged by courts when called for in

administering justice, to wit: **All things are presumed to be lawfully done until proof be made to the contrary.** (2 Co. Litt. (1 Am. Ed.) 232b.) **All things are presumed to have been rightly and duly performed until it is proved to the contrary.** (Co. Litt. 232, Ibid.) Agreeably to those presumptions run the trite ones that innocence is presumed, that negligence is not presumed, and many more of the family of friendly inferences."

Hartwell v. *Parks*, 240 Mo. 537 at 540.

5. The fact that the creditor's name did not appear in the schedule is not evidence, and does not warrant any presumption, that the debt was "not duly scheduled" within the meaning of said clause (3), for that clause requires the name of the creditor *only if known* to the bankrupt.

a. Said clause (3) excepts debts which have not been scheduled "with the name of the creditor *if known to the bankrupt*".

b. The context of that clause indicates that Congress contemplated that a debt might be duly scheduled even though the creditor's name did *not* appear. A study of the arrangement of that clause and particularly of its punctuation makes it clear that the **only** *instance where the failure of the creditor's name to appear in the debtor's schedule becomes material* in determining whether the debt came within the class of debts excepted by that clause from the operation of the discharge is the instance *where* **that creditor's name was known to the bankrupt.** It follows then, that if the creditor in attempting to establish that his debt was not duly scheduled, wishes to rely on the failure of his name

to appear in the schedule, he must, in addition thereto show that his name was known to the debtor.

See *Kreitlein* v. *Ferger,* 238 U. S. 21, at 32-33, where this Court, in considering the creditor's contention that the scheduling of his debt was fatally defective because the street and number of his residence were not given, and referring to the Bankruptcy Rule which provides that the schedules "should state the street and number of their residence or place of business *so far as known*", said:

"But without considering the effect of such Rule, *it is sufficient to say that,* in the present case, *there was nothing to show* . . . that Kreitlein (the debtor) *knew such address* at the time he made the schedule."

c. For aught that appears in the record in this case the debt which became merged in the judgment may have been in the form of a note of which the creditor may have been an indorsee and the debtor the maker, and the debt may have been scheduled as a note with the payee as the creditor, the debtor not knowing who the indorsee was. It is just as reasonable that such an inference be drawn from the record as any other inference. And if the debt had been so scheduled it would not necessarily follow that the debt had not been *duly* scheduled.

Kreitlein v. *Ferger,* 238 U. S. 21 at 28.

6. That this unfounded conclusion of fact that the debt had not been scheduled must have had an important bearing in inducing the Massachusetts Supreme Court to sustain the judgment of the lower court is apparent from the following excerpts from the opinion of the court:

a. After quoting the beginning and clause (3) of

Section 17 of the Bankruptcy Act, the court went on to say:

> "The fair implication of these words is that the person who asserts the force of the discharge as a bar must show *in those instances where the debt has not been scheduled as required by law* and hence is within the exception to the bar of the discharge in bankruptcy, that nevertheless the debt is barred because within the excepted class of such unlisted debts belonging to creditors who either had notice or actual knowledge of the proceedings."
>
> (Transcript of Record, p. 20.)

b. Again, when referring to the effect of a discharge in bankruptcy as being a bar to debts, the court went on to say:

> "But if the creditor, through no fault of his own *but wholly through the fault of the debtor upon whom is cast that duty by the law,* has no notice or knowledge of the opportunity afforded him to appear in bankruptcy court, there appears to be no natural justice in holding him bound by its adjudication."
>
> (Transcript of Record, p. 21.)

Here the Court assumes fault of the debtor **without proof of such fault** within the terms of the Act. No fault is shown under the terms of the Act by evidence that the *creditor's name* does not appear in the schedule unless it is also shown that the debtor knew his name.

This is contrary to the well established rule that a person *shall be presumed innocent* and that such a charge *must be clearly proved by the party making it.*

10 Ruling Case Law, Evidence, Section 49.

1 Greenleaf, Evidence, Sections 78, 81.

c. Then again, a little later, the court said:

"A mere proffer of a discharge in bankruptcy, *without facts to show that an unscheduled creditor* by the terms of the act became subject to the jurisdiction of the bankruptcy court, does not make the discharge effective as to such creditor."

(Transcript of Record, p. 21.)

d. Still further on in its opinion the court said:

"Since the discharge is for the benefit of the debtor and not of the creditor there would seem to be a defect in the law if the burden of proving negative consequences *arising from the default of the debtor* should be borne by the creditor and not by the debtor."

(Transcript of Record, p. 21.)

Here, as in (b) *supra*, default is **assumed without proof.**

e. And finally, in the last paragraph of its opinion, the court said:

"There was no legal inconsistency or reversible error in ruling that the discharge in bankruptcy was on the facts prima facie evidence that the plaintiff's claim was scheduled and that the burden of producing some evidence to meet this prima facie proof rested upon the plaintiff and at the same time finding in favor of the plaintiff. The plaintiff met the prima facie proof made out by the discharge *by proof from the record of the bankruptcy court that his debt was not scheduled by the bankrupt.*"

The evidence does **not show** that the debt was not scheduled but **merely** that in the schedule the **name** of the creditor did not appear.

E. There was no evidence in the record to warrant any presumption or conclusion of fact by the court that the debtor knew the creditor's name at the time he prepared his schedules in bankruptcy.

1. It was easy for the creditor to have shown that his name was known to the bankrupt (the debtor) and as the burden was upon him (the creditor) to establish that his debt was excepted from the discharge, the presumptions were against the fact of such knowledge rather than for it. Absence of evidence upon any material point is as fatal to him who has the onus as the absence of all evidence would be.

McDaniel v. *Traylor*, 212 U. S. 428 at 434.

Steele's Adm. v. *Hillman Land & Iron Co.*, 114 S. W. 311 (Ky.).

2. The only process of reasoning by which the court could have arrived at the conclusion that the name of the creditor was known to the debtor was as follows: That because the judgment had been entered against the defendant it should be presumed that the debtor had been duly served with process, and therefore having been duly served with process it must be presumed that the debtor knew the creditor's name. But it is well settled that a material fact necessary to a party's case cannot be held to have been established by a mere presumption which is itself based upon another presumption.

U. S. v. *Ross*, 92 U.S. 281.

Manning v. *John Hancock Mutual Life Ins. Co.*, 100 U.S. 693.

3. But even the presumption that there had been due service of process in the original action would

not warrant any presumption that the debtor knew the creditor's name, for personal service on the debtor, is not a necessary element for a judgment. Other forms of service might have sufficed—*e. g.* publication or leaving copy at last place of abode—Mass. Rev. Laws, c. 170 and c. 167, §§ 31, 34, all of which fall far short of actual notice to the debtor and from none of which would a presumption be warranted that the debtor had actual knowledge of the name of the plaintiff (the creditor). And if in fact there had been personal service on the debtor, that fact could easily have been established by the creditor and made to appear in the record.

4. The mere fact that the creditor had secured a judgment against the debtor in 1904 is not evidence, and does not warrant any presumption, that the creditor's "name was known to the bankrupt (the debtor)" in 1912 when he prepared his schedules in bankruptcy.

a. It will not be presumed that a person who once had knowledge of a fact retained such knowledge for a considerable length of time, or that a fact once known to a person will always be present in his memory.

Hall etc. Co. v. *Haley etc. Co.*, 174 Ala. 190 where the Court says:

"The law does not presume that a fact once known is never forgotten, for this is contrary to all human experience."

b. This principle seems to have been recognized by this court in the *Kreitlein* case for in the last paragraph of its opinion the court says (at p. 34):

"These schedules are often hurriedly prepared, long after the date of the transaction out of which the debt grew, and where books and papers, which might otherwise have furnished a more complete address, have been lost or destroyed."

c. A presumption must be based on some necessity and the court will not go into the domain of presumption where direct proof can be obtained.

22 Corpus Juris, Evidence, 83.

5. This point was definitely raised and decided in the well-considered case of *Morency* v. *Landry*, 79 N.H. 305. In that case the creditor's name did not appear in the schedule, and the court after referring to the rule established by the *Kreitlein* case as to the burden being cast upon the creditor to show that his debt was excepted from the operation of the discharge and relying *solely* upon that rule, said:

"*This imposed on the plaintiff (the creditor) the burden of offering evidence tending to show that Landry (the debtor)*, when he filed his petition, *knew Morency's (the creditor's) relation to him as a creditor*, thro the bank judgment. *No such evidence was offered* and there was no error in the order dismissing the appeal."

See also *Steele* v. *Talheimer*, 74 Ark. 516 and the *Kreitlein* case. In the latter this Court said, in referring to the Bankruptcy Rules of one of the New York Districts wherein the debtor is required to list the "residence" of the creditor *so far as known*, said:

"But without considering the effect of such a

rule it is sufficient to say that there was nothing to show that K. (the debtor) knew such address at the time he made the schedule."

F. The well-established rule that a person shall be presumed innocent until he is proved guilty would seem in itself to be sufficient to make it clear that any presumption that the debtor knew the creditor's name when he made his schedules was improper. Such a charge against a debtor should have to be clearly proved by the party making it.

10 Ruling Case Law, Evidence, Section 49.
1 Greenleaf, Evidence, Sections 78, 81.

G. Any such presumption is contrary to the spirit and purpose of the Bankruptcy Law.

(1) The provision of the law relating to the discharge of bankrupts should *not* be construed against the bankrupt nor should all implications and doubts be resolved against him, for the release of the unfortunate and insolvent debtor from the burden of his debts and his restoration to business activity in the interest of his family and of the general public is one of the main, if not the most important, objects of the law.

Hardie v. *Swafford Bros. Dry Goods Co.*, 165 Fed. 588 (C. C. A. 5th Cir.).

See also *Burlingham* v. *Crouse*, 228 U.S. 459 at 473.

See also *Wetmore* v. *Markoe*, 196 U. S. 68 at 77, where the Court said: "The Bankruptcy Law should receive such an interpretation as will effectuate its beneficient purposes. . . ."

II. As to the Question of Burden of Proof of Notice or Actual Knowledge of the Bankruptcy Proceedings.

A. The debtor submits that, notwithstanding the conclusion which the Massachusetts Courts, in giving judgment for the creditor, evidently must have made as to the due scheduling of the debt, nevertheless the Massachusetts courts clearly erred in ruling that the burden was on the debtor to show that the creditor had notice or actual knowledge of the bankruptcy and in giving judgment for the creditor based upon such a ruling.

B. A plea of a discharge in bankruptcy is a plea in bar.

21 Ruling Case Law, Pleading, Sec. 109 and cases cited.

C. It is not an unconconscionable or odious defense to an action to recover a debt and has been referred to as being similar to the defense of the statute of limitations.

Citizen's Nat'l Bank v. *Branden*, 19 N. D. 489.

D. Such a plea shifts to the creditor, if he would avoid it, the burden of *proof*. The only burden of proof upon the debtor who has pleaded his discharge in bankruptcy is to prove that discharge. That burden is completely sustained by the introduction of a duly authenticated copy of the order for his discharge. The burden of *proof*, not merely the burden of evidence, is thereupon placed upon the creditor, if he would avoid the plea by any exception in the statute, to establish that he comes within that exception.

(1) Such is the clearly established doctrine where the statute of limitations is pleaded.

Piatt v. *Vattier*, 9 Pet. 405, 416.

Ross v. *Duval*, 13 Pet. 45.
Marsteller v. *M'Clean*, 7 Cranch, 156.
Pierce v. *Perry*, 189 Mass. 332.

(2) Such a doctrine should also apply where a discharge in bankruptcy is relied upon.

a. One of the main purposes of the bankruptcy statute like that of the statutes of limitations is the quieting of litigation with respect to debts within the scope of such statute and the relief of such debtors.

b. Such a result was reached in the *Kreitlein* case although without reference to the analogy to the case where the statute of limitations is pleaded—the court holding that "the introduction of the order makes out a prima facie defense" (note that this Court speak of it as a prima facie *defense* rather than as prima facie *evidence*).

E. That the burden should be upon the creditor to show that his claim is excepted by law from the operation of the discharge is the obvious conclusion from a study of the history and purposes of the Bankruptcy Law as shown in the various decisions of this Court construing said Law.

(1) The policy of the Bankruptcy Law "was, after taking from the bankrupt all his property not exempt by law, to discharge him from his debts and liabilities and enable him to take a fresh start." The decisions of this Court "lay great stress upon this feature of the law".

Stellwagen v. *Clum*, 245 U.S. 605, at 617.
Traer v. *Clews*, 115 U.S. 528, at 541.
Burlingham v. *Crouse*, 228 U.S. 459, at 473.
Wetmore v. *Markoe*, 196 U.S. 68, 77.

(2) The rule thus established, placing the burden on the creditor to show that his claim is excepted from the operation of the discharge, is "concordant with equity and consistent with the object and intention of Congress in enacting" the Bankruptcy Law. "A different construction would be inconsistent with the liberal spirit which pervades the entire bankruptcy system."

Cf. Neal v. *Clark,* 95 U. S. 704 at 709.

F. "In view of the well known purposes of the Bankruptcy Law, exceptions to the operation of a discharge should be confined to those plainly expressed."

Gleason v. *Thaw,* 236 U.S. 558, at 562.

G. It is a well established rule of statutory construction that where a statute creates a right or rights and certain exceptions are made in the clause creating such rights, the burden is upon the party claiming such a right not only to plead the statute but also the facts negativing the exception.

Black, Interpretation of Laws, p. 429.
Sedgwick, Construction of Statutes and Constitutional Law, 2nd Ed. pp. 50, 93.
Potter's Dwarris on Statutes, p. 119;
Lewis' Sutherland, Statutes and Statutory Construction, 2nd Ed. Sec. 351 (p. 671).

1. It is incumbent upon one claiming "a peculiar right given by a statute—a right not common to all, and which is given only when a prescribed state of facts shall exist", to show the existence of *that state of facts.*

The "Edith" (*Poole v. Tyler*), 94 U. S. 518, at 522.

2. In our case the creditor claims the "peculiar

right" of having his debt excepted from the operation of the debtor's discharge. Clause (3) of Section 17 of the Bankruptcy Act *confers upon him the benefit of such an exception.*

Friend v. *Talcott*, 228 U. S. 27, at 38–40.
Kreitlein v. *Ferger*, 238 U. S. 21.

3. The "prescribed state of facts" which must exist to enable the creditor to claim the "peculiar right" given him by said clause (3) is namely:—that the debt had "not been duly scheduled, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."

4. Said clause (3) is devoted to defining only one *class* of debts, which is benefited. Not all but only *certain* unscheduled or improperly scheduled debts are included in that class. See *Delta County Bank* v. *McGranahan*, 37 Wash. 307, 309. In defining that class the statute starts in by referring to a broad general class, *i. e.*, debts not scheduled with the name of the creditor, *but then* it limits that general class by adding certain qualifications or exceptions, to-wit:—that the name of creditor must have been known to the debtor; that the creditor must have had no notice; and that the creditor had no actual knowledge of the bankruptcy proceedings. Therefore, unless *all three* of those exceptions are negatived clearly the debt cannot be said to have been brought within the class of benefited debts created by said clause (3).

5. It is a well established rule of evidence that where a negative is essential to the existence of

a right, the party claiming the right has the burden of proving such negative.

10 Ruling Case Law, Evidence, Sec. 49.

Freeman v. *Blount,* 172 Ala. 655.

Colorado Coal Co. v. *United States,* 123 U. S. 307 at 319.

H. It must follow, then, that in order for creditor to bring his debt within the class excepted by said clause (3) from the operation of the discharge the following **three or four distinct and essential facts must have been established by evidence.**

1. *Either* (a) that the debt was not scheduled in time for proof and allowance,

or (b) that it was not so scheduled in the name of the creditor **and** that the name of the creditor was known to the debtor.

Morency v. *Landry,* 79 N.H. 305, 108 Atl. 855.

Steele v. *Thalheimer,* 74 Ark. 516.

Also, if 1 (a) or 1 (b) are established by the evidence then it must appear,

2. that the creditor had no notice,

and 3. that the creditor had no actual knowledge of the proceedings in bankruptcy.

Laffoon v. *Kerner,* 138 N.C. 281.

Manheim v. *Loewe,* 173 N.Y. Supp, 260; 185 App. Div. 601.

Re Peterson, 121 N.Y. Supp. 738; 137 App. Div. 435.

Thompson v. *Caverly,* 148 Ill. App. 295 (semble).

J. In the case at bar none of these facts (1 (a), 1 (b), 2, or 3) were established by any evidence. All of these

three or four facts (as the case may be) being essential facts which must appear in order to bring the debt within said clause (3), it follows that the creditor had the burden of establishing, or at least of going forward with the evidence to establish these essential facts, and he certainly **cannot be held to have sustained that burden by showing nothing but one of the necessary elements of 1 (b).**

1. In the case of *Morency* v. *Landry, supra*, it appeared that the debt was not scheduled under the name of the creditor, J. A. Morency, but no evidence was offered as to whether the bankrupt knew Morency's relation to him as a creditor. The court held that the Bankruptcy Law as construed by this Court imposed upon the creditor the burden of showing that the bankrupt knew Morency's relation to him as a creditor. It should also be noted that, although the lower court in that case *had found* that the creditor *had actual knowledge*, yet the validity of that finding was one of the questions which was also apparently open on the appeal and the New Hampshire Supreme Court expressly left that question out of consideration and ignored that finding, saying that their conclusion on the question of burden of offering evidence as to the debtor's knowledge of the creditor's name rendered it "unnecessary to consider whether the mailing of notices to F. Morency and F. Morency & Co. authorized the finding that J. A. Morency (the creditor) had actual knowledge of the proceedings.

2. In the *Peterson* case (*supra*) the question was whether a discharge in bankruptcy having been

shown, it was necessary for the debtor to show that the claims were *not* excepted from the operation of the discharge, and the court, in holding that such burden was *not* upon the debtor but upon the creditor, said: "In order to defeat the discharge . . . the burden was upon the plaintiff (the creditor) to establish by sufficient evidence and an appropriate finding that its claim was one of those excepted from the effect of a discharge. If the appellants (the creditor) claimed their debts were excepted because not properly scheduled, and they had no notice or knowledge . . . they had the burden of showing the facts upon which their claim rested."

3. In the case of *Manheim* v. *Locwe* (*supra*), action was brought upon two promissory notes which came due in 1908. The debtor produced a certified copy of his discharge in bankruptcy which had been granted him in 1912 and rested. No evidence was offered either as to the schedules or as to notice and the court after referring to the following statement in the case of *Hyde Park Flint Bottle Co.* v. *Miller*, 166 N.Y.S. 110; 179 App. Div. 73:— "The burden of proof rests upon the defendants to show that the judgment was discharged. One element necessary to prove this fact is that it was duly scheduled. This they failed to do", went on to say as follows:

> "But this statement as to the burden of proof is inconsistent with the law as laid down in Kreitlein vs. Ferger, and the other New York case (re Peterson, supra), which is controlling and which holds to the contrary, and places

the burden of proof upon the creditors to show that their claim was not properly scheduled *and* they did not have notice of the bankruptcy proceedings."

4. In the case of *Laffoon* v. *Kerner* (*supra*), *Larsen* v. *Hyman*, 126 N.Y. Supp. 100, and re Peterson, 121 N. Y. Supp. 738, the debtor in each instance rested after having proved his discharge in bankruptcy, and there was no evidence either as to the schedules or as to notice, and the court, in making the same holding as in *Manheim* v. *Loewe* (*supra*) used substantially the same language as that quoted in the preceding paragraph.

5. In so far as the opinion in the case of *Bailey's Adm.* v. *Gleason*, 76 Vt. 115, is contrary to rules laid down in the cases above referred to, it must be considered as in effect overruled by the Kreitlein case. The Vermont case, although recognizing the general rule that the burden is not upon the debtor to show that the debt is not within any of the excepted classes and that it is for the creditor by his replication to bring the debt within some exception, nevertheless attempts to attribute a different character to the class of debts covered by clause (3) and establish an exception as to that class from such general rule by holding in effect that a debtor in pleading a discharge in bankruptcy must also make such allegations as will show either that the debt was duly scheduled or that the creditor had knowledge of the proceedings. In the Kreitlein case not only did this Court say that, upon the introduction by the debtor of the order for discharge, the burden is

"then cast upon the plaintiff (the creditor) to show that, because of *failure to give notice* or other statutory reason, the debt sued upon was by law excepted from the operation of the discharge", but this Court also pointed out that the debtor in that case had *unnecessarily* offered in evidence the schedule to show that the creditor was listed.

K. It must be held to be contrary to the Bankruptcy Law, as construed by this Court, to presume, in favor of the creditor, merely from the fact that the creditor's name did not appear in the schedules, any of the other three facts which the creditor must also show in order to make out his case, *i. e.*, to show that his debt is excepted from the operation of the discharge. To hold otherwise would in effect be a denial of the rule that the burden was upon the creditor to bring his debt within the excepted class, for to bring it within that class —e. g. clause (3)—at least three or four distinct facts must appear (see paragraph H H on page 25 above) and it certainly would be taking two inconsistent positions to hold that the burden is upon the creditor to bring his debt within a class to do which at least three or four essential facts must be made to appear and then at the same time hold that the creditor need offer evidence of only one of those facts and that the other two or three essential facts may be presumed from that one fact.

L. The presumption, if any, in the case at bar, is that the creditor *did* have notice or actual knowledge of the bankruptcy proceedings.

1. Section 21f of the Bankruptcy Law creates a statutory presumption as to the regularity of the

proceedings, and it has been held that under this section it would be presumed that the debts were properly scheduled and that the creditor had notice.

Re Peterson, 121 N.Y. Supp. 738, at 740; 137 App. Div. 435, at 438.

Niles v. *Havens*, 198 App. Div. 546; 190 N. Y. S. 656.

See also *Hartwell* v. *Parks*, 240 Mo. 537 at 540 (on p. 12 supra).

2. In this case the material fact was a negative fact. If the creditor had no notice or actual knowledge of the bankruptcy proceedings no one could know that fact better than the creditor himself. Such a negative fact was peculiarly within the knowledge of the creditor. If he had had no such notice or actual knowledge, he could easily have testified to that effect. It is, therefore, only the natural and fair presumption that he in fact did have such notice or actual knowledge, else he would have denied it.

3. Nothing in the creditor's affidavit of no defense (p. 7 of the Transcript of Record) can be considered as evidence in favor of the creditor in this case, nor even as a denial by the creditor of notice or actual knowledge.

Mass. Acts of 1911, c. 305 (in force at the time of the trial of this case) relating to such affidavit, provided that "In any trial any affidavit filed by either party, as herein provided, may be given in evidence *against* him."

Mass. Rev. Laws, c. 173, § *85,* provided that "Pleadings shall not be evidence on the trial,

but the allegations therein shall bind the party making them."

Taylor v. *Weingartener,* 223 Mass. 243, at 246,

Where the court says:

"The suggestion of the plaintiff that the denial in the bill sworn to by him was evidence that he denied having received notice of the sale is not tenable . . . Allegations in a bill which is sworn to are admissions of the truth of the facts stated, but they are not affirmative evidence in favor of the plaintiff."

4. Such an affidavit is not even a pleading but merely a statement of reasons which a party, desiring a speedy trial, may file, and is considered *only* on the question of whether the case should be advanced on the trial list. Furthermore, it does not seem to have considered as evidence or in any respect by either of the Massachusetts Courts.

5. In view of the presumption created by Section 21f as to the regularity of the proceedings it must be held in the case at bar that the notice of the first meeting of creditors was duly published as provided by Section 58b of the Bankruptcy Law. Therefore, in view of the creditor's failure to deny, either in his pleadings or by his testimony, that he had notice or actual knowledge of the proceedings, it would be the natural and reasonable presumption that, having had at least constructive notice through such publication, he had had "notice" within the meaning of that word as used in clause (3) of Section 17. And right here it should be noted that Congress in enacting the Bankruptcy Law apparently did not see fit to qualify or limit

the word "notice" in that clause (3) although it did qualify or limit the word "knowledge" in the same clause to "actual knowledge".

D.

THERE APPEARS TO BE A CLEAR CONFLICT BETWEEN THE DECISIONS OF STATE COURTS AS TO THE QUESTIONS RAISED IN THE CASE AT BAR.

The cases supporting the view that the burden is upon the creditor to show *all* the facts necessary to bring his debt within the class excepted by clause (3) of Section 17 from the operation of the debtor's discharge in bankruptcy appear to have been based upon sounder reasoning and are more consistent with the purpose of the Bankruptcy Law than the cases opposed to that view.

A. It is submitted that the case of *Morency* v. *Landry*, 79 N.H. 305, 108 Atl. 855, is the best considered and soundest of the various State court cases in which the question of burden of proof under clause (3) of Section 17 is considered, and is a direct authority to the effect that the burden is upon the creditor to show *all* the facts necessary to bring the debt within the class of debts excepted by said clause (3) from the operation of a discharge.

1. In that case the creditor was the payee of a note which had been signed by the debtor, which note had been discounted at a bank, and the bank having recovered judgment against both the creditor and debtor the creditor had paid the judgment in 1902. In 1906 the debtor went into bankruptcy and in 1912 received his discharge. About 1918 the creditor filed his claim against the estate of the debtor, then deceased. The debtor's discharge having been shown, it appeared that the

creditor's name did not appear in the debtor's schedules but there was no evidence as to whether the debtor knew the creditor's relation to him as a creditor. The court after citing the case of *Stellwagen* v. *Clum*, 245 U.S. 605, at 617, as to the purpose of the Bankruptcy Law and the *Kreitlein* case, expressly held that the Bankruptcy Law, as construed by this Court, imposed upon the creditor the burden of offering evidence tending to show that the debtor, when he filed his petition, knew the creditor's relation to him as a creditor.

2. Furthermore the court expressly declared that in view of that conclusion it was unnecessary for it to consider whether the evidence in the case authorized the finding, which the lower court had made, that the creditor had actual knowledge of the proceedings.

B. In each of the following cases the court in its opinion clearly points out that the burden is upon the creditor to allege or show, not only that the debt was duly scheduled with the name of the creditor, but also that the debtor knew either the facts necessary to enable him to so schedule it or that the creditor had no knowledge of the bankruptcy proceedings, or both.

1. In *Steele* v. *Thalheimer*, 74 Ark. 516, the court, in holding that the creditor was barred by the debtor's discharge in bankruptcy notwithstanding the creditor's contention that he had no notice and that his address had not been correctly given, said: "The act . . . excepts only those (debts) which have not been duly scheduled in time . . . with the name of the creditor, if known to the bankrupt . . . besides it is not alleged or shown

that the bankrupt knew the address of the creditor, or that the failure to give his correct address was intentional or fraudulent."

2. In *Luffoon* v. *Kerner*, 138 N.C. 281, the court says: "The creditor may notwithstanding (the discharge) show that his debt is of the excepted class. The onus, however, is on him and if he fails to make the proof, the debt will be taken to (be) one of an ordinary character. . . ." The court after disapproving one of its early decisions (*Balk* v. *Harris*, 130 N.C. 381) in so far as that decision said that the debtor must show that the debt was scheduled *or* that the creditor had notice, goes on to say: "We are of the opinion that the burden was upon the plaintiff (the creditor) to show that his debt was not scheduled *and* that he had no notice of the proceedings in bankruptcy."

3. In *Manheim* v. *Loewe*, 173 N.Y. Supp. 260 (185 App. Div. 601), the court, after disapproving *Greber* v. *Gault*, 93 N.Y. Supp. 76, 103 App. Div. 511, and referring to *Hyde Park Flint Bottle Company* v. *Miller*, 179 App. Div. 73, as being inconsistent with the *Kreitlein* case, said: ". . . the burden of proof is upon the creditors to show that their claim was *not* properly scheduled *and* they did not have notice of the bankruptcy proceedings."

4. In *Re Peterson*, 121 N.Y. Supp. 738; 137 App. Div. 435, the court in determining the question whether it was necessary for the debtor to show that the debts were not excepted from the operation of the discharge, and there being no proof as to the schedules or notice, said: "If the appellants

(creditors) claimed their debts were excepted because not properly scheduled *and* they had no notice or knowledge—they had the burden of showing the *facts* upon which their claims rested."

5. In *Alling* v. *Straka,* 118 Ill. App. 184, the court said: ". . . If the debt sued on falls within one of the exceptions of the bankruptcy act it is a matter of reply for the plaintiff (the creditor) to make. The burden is upon her to prove it. The burden of proof should follow the pleadings."

6. In the case of *Niles* v. *Havens,* 190 N.Y.S. 656; 198 App. Div. 546, in discussing the effect of a discharge in bankruptcy, the court said:

> "The introduction of such proof of a discharge in bankruptcy makes a prima facie defense; the presumption being that the bankrupt's debts were scheduled properly and that due notice had been given, and the burden then being cast upon the plaintiff in the action to show that because of the nature of the claim, failure to give notice, or other statutory reason the debt sued on was by law excepted from the operation of the discharge."

See also *Van Norman* v. *Young,* 228 Ill. 425.

C. None of the decisions in the cases cited by the Massachusetts Supreme Court as supporting its opinion in the case at bar appear to have been based upon any consideration of the history or purposes of the Bankruptcy Law as heretofore set forth and referred to by this Court in the cases heretofore cited in this brief.

(1) In *Wineman* v. *Fisher,* 135 Mich. 604, the court in holding that the debtor had the burden of prov-

ing that the creditor had no notice or knowledge where it appeared **that the debt was not scheduled**, apparently based its opinion entirely upon Potter's Dwarris, Statutory Const. 119; Sedgwick, Statutory Construction, 2nd ed. p. 93, and 1 Chitty Crim. Law, p. 223, evidently proceeding upon the theory that the purpose of Section 17 of the Bankruptcy Act was to confer upon or grant to a debtor the benefit of having certain of his debts discharged as a result of his bankruptcy proceedings. That such a theory is unsound is clear from the opinion of this Court in the case of *Friend* v. *Talcott, supra.* In the *Talcott case* this Court pointed out that the purpose of Section 17 was to *confer* upon certain *creditors* the right or benefit of having certain debts excepted from the operation of the discharge. That being so the citations in the *Wineman* case would seem to be directly contrary to the holding for which they are cited, for they declare that where a statute creates a *right* or rights and certain exceptions are made therein, the *burden* is upon the party *claiming* such a *right* to negative such exceptions.

(2) The case of *Armstrong* v. *Sweeney*, 73 Neb. 775, was a proceeding brought by the debtor to restrain the sale of his goods on execution. In his petition he alleged not only the discharge but also that the creditor had knowledge of the bankruptcy. The court, in holding that the debtor had not established that the creditor had knowledge apparently based its decision upon the pleadings in the case, saying: "The burden of proof was upon the plaintiff to sustain the allegation of his petition that Hall (the creditor) had knowl-

edge of the bankruptcy proceedings in time to prove his claim." No citations were given, and there was no reasoning in the opinion indicating how the court arrived at its conclusion.

(3) In *Collins* v. *Crews*, 3 Ga. App. 238, the debtor had alleged in his answer that the creditor had actual notice of the proceedings, and in holding that the debtor had failed, on the evidence, to prove such notice, said: "The defendants (the debtors) *having assumed the burden* (of proving notice) the issue in the case turned on whether they could disprove the testimony of Crews and show that Crews had knowledge." No authority was cited and here again the question as to burden of proof apparently was made to depend upon the pleadings.

(4) The case of *Sloan* v. *Grollman*, 113 Md. 192, was a proceeding by the debtor to restrain the enforcement by the creditor of a judgment. It appeared that the **creditor's debt had not been scheduled.** The complainant, the debtor, alleged that he had personally notified the creditor by mail but the creditor denied the allegation. The court, in holding that the debtor had not sustained the burden of proof, without apparently any consideration of the history or purposes of the Bankruptcy Act or the decisions of this Court with respect to it, based its decision upon the authority of the three preceding cases.

(5) The various Texas cases that appear to support the creditor's position in the case at bar are based on a line of decisions in that state which preceded the *Kreitlein* case and held, contrary to the *Kreit-*

lein case, that the burden was upon the debtor to show that the debt did not come within any of the exceptions to the operation of the discharge.

(6) The opinion in *Calmenson* v. *Moudry*, 137 Minn. 123, is based upon the preceding cases and the case of *Bailey's Adm.* v. *Gleason, supra*, which as pointed out above (see p. 28 of this brief) must be considered as in effect overruled by the *Kreitlein* case. The court merely states its conclusion without any reasoning, much less any consideration of the Bankruptcy Law as construed by this Court.

D. The cases of *Miller* v. *Guasti*, 226 U.S. 170, and *Birkett* v. *Columbia Bank*, 195 U.S. 345, are not helpful in the case at bar for in those cases the decisions, as pointed out in the *Kreitlein* case, were based on **extrinsic proof** and on **express** findings that the **debtor knowingly failed** to properly schedule the debt and also that the creditor did **not have notice** or **actual** knowledge of the proceedings prior to the discharge of the bankrupt therein.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF THE MASSACHUSETTS COURT SHOULD BE REVERSED, AND THAT THE PETITIONERS (THE DEBTOR) ARE ENTITLED ON THE RECORD TO HAVE JUDGMENT ENTERED IN THEIR FAVOR.

EDWARD E. BLODGETT,
GEORGE S. FULLER,
IRVING F. CARPENTER,
Counsel for Petitioners.

Supreme Court of the United States

No. 164

OCTOBER TERM, 1952

DONALD M. BELL, ET AL., Petitioners,

v.

CHARLES S. SMITH, Respondent.

BRIEF FOR RESPONDENT

Edward F. McClennen,
Nelson A. Rockefeller,
For the Respondent.

September, 1952.

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SUPREME COURT OF THE UNITED STATES.

TOBER TERM, 1922. No. 164.

DONALD M. HILL ET AL., *Petitioners,*

v.

CHARLES S. SMITH, *Respondent.*

BRIEF FOR RESPONDENT.

The respondent in this case submits that:

First. This case is without the jurisdiction of this Court cause it involves no question arising under the laws of the ited States.

Second. The Supreme Judicial Court of Massachusetts ided this case correctly.

Charles S. Smith, the respondent to this writ of certiorari, brought suit in the Superior Court of Massachusetts March 20, 1914, against Warren M. Hill (whose executors the petitioners are) to recover on a judgment rendered against Hill in favor of Smith on May 2, 1904, in the same court. Hill answered, setting up a discharge in bankruptcy obtained by him December 3, 1912, by which he was discharged from all provable debts except such debts as are by law excepted from the operation of a discharge in bankruptcy (p. 6). Smith filed an affidavit that the schedule filed by Hill in the bankruptcy proceedings referred to did not contain Smith's name, which was known to Hill, and that Smith did not have notice or actual knowledge of the bankruptcy proceedings (p. 7). Hill filed a counter affidavit alleging that he was discharged from the plaintiff's claim, but not denying the allegations of Smith's affidavit as to his knowledge of Smith's name and its absence from the schedule and his lack of notice or knowledge of the proceedings (p. 9). Hill died, and the petitioners, his executors, were summoned in as defendants. At the trial, the plaintiff proved the judgment, the defendants proved the discharge, and the plaintiff proved by the schedule that his name was not on Hill's schedule of creditors. There was no other evidence.

The defendants submitted requests for rulings, all of which the Court granted except the third and fourth, namely, that the burden is upon the plaintiff to show that he was not notified of the defendants' bankruptcy, and that he had no knowledge of the defendants' bankruptcy (p. 14).

The refusal of these requests is the only error alleged in the case. The Court gave judgment for the plaintiff. The defendants took the case by Bill of Exceptions to the Supreme Judicial Court. That Court overruled the exceptions. Judgment was entered for the plaintiff for $9,891.38 (p. 17).

The defendants applied to this Court for a writ of certiorari. The plaintiff did not appear. This Court granted the writ.

FIRST.

THIS CASE IS WITHOUT THE JURISDICTION OF THIS COURT BECAUSE IT INVOLVES NO QUESTION ARISING UNDER THE LAWS OF THE UNITED STATES.

The defendants' only grievance is that the State Court refused to rule that the burden was on the plaintiff to show lack of notice or knowledge of the defendants' bankruptcy (p. 14).

This does not involve any question of substantive law and much less any law of the United States. Smith had a judgment against Hill. Hill had a discharge in bankruptcy. The effect of that discharge was not in dispute. It was determined by the language of the Bankruptcy Act, clear beyond the need of any interpretation, namely:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as . . . have not been duly scheduled in time for proof and allowance with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy."
>
> *Act of 1898*, Ch. 541, Sec. 17 (a), 30 Statutes, 550; amended by *Act of 1903*, Ch. 487, Sec. 5, 32 Statutes, 798.

This section provides expressly that the non-scheduled Smith's claim is not barred unless he had notice or knoweldge of the proceedings. The only question which the defendants raved was whether Smith must show that he had not, or the defendants must show that he had, such notice or knowledge. This involves no interpretation of the Bankruptcy Act, and no effect of the discharge. It involves only a question of showing. The defendants' third and fourth requests do not suggest a claim that the law governing this evidential matter in a Massachusetts court is derived from the United States.

The Supreme Judicial Court in its opinion deals with the question as one of the law of proof which prevails in a Massachusetts court (p. 22). It is of course necessary to look at the Bankruptcy Act in order to determine what facts are relevant, but that statute is not one dealing with evidence and does not purport to deal with the question of which party must prove or disprove the relevant facts or produce evidence thereof.

It is well settled that a case turning on a ruling relating to proof, procedure or local practice, even though Federal rights are involved, does not raise any Federal question, and is not within the jurisdiction of this Court.

Egan v. *MacDonald*, 246 U. S. 227, 230.
Turner v. *New York*, 168 U. S. 90, 95.
Washington v. *Miller*, 235 U. S. 422, 429.

Neither does the mere fact that a defense is based on a law of the United States give this Court jurisdiction if the case involves no question as to the validity, construction or effect of this law.

Norton v. *Whiteside*, 239 U. S. 144.
Hull v. *Burr*, 234 U. S. 712, 720.
Shulthis v. *McDonald*, 225 U. S. 561.
McGilvra v. *Ross*, 215 U. S. 71.
Mammoth Mining Co. v. *Grand Central Mining Co.*, 213 U. S. 72.
Minnesota v. *Northern Securities Co.*, 194 U. S. 48.

The question in the case at bar was far removed from one of validity, construction or effect of any law of the United States. Indeed, on the facts presented to the Court there was no evidence whatever upon which it could base a finding that the plaintiff had knowledge of the bankruptcy. Applying the Massachusetts rule as to the respective duties of the parties to offer proof, the Court could only find in the absence of evidence to the contrary that the plaintiff had no notice or

nowledge of the bankruptcy proceedings. This in effect as the finding of fact on which the judgment of the Court as based. That being the case, there was no room for interetation of the statute, the terms as applied to such circumances being explicit.

In *Birkett* v. *Columbia Bank*, 195 U. S. 345, this Court based s decision exclusively on the finding of the state court relating o lack of knowledge, although in that case it was argued by ounsel that the rule as to burden of proof should affect the esult, and the same view was taken by the dissenting opinion f the state court.

Columbia Bank v. *Birkett*, 174 N. Y. 112.

Although not put in evidence at the trial, the trial court new from the plaintiff's affidavit in the Record that the plainff did not have notice or knowledge of the defendant's bankuptcy. The case before this Court approaches a moot case. reversal of the judgment would be followed by the plainff's testimony according to his affidavit, and a reentry of ne same judgment. The sole question for the trial court was ho should ask of the plaintiff Smith the question, "Did you ave knowledge of this bankruptcy?" The trial court deded that the proper procedure was for the defendant to ask uch question, or otherwise show notice or knowledge. This as merely a question of the order of proof.

The defendants' requests for instructions to the contrary id not mention validity, construction or effect of the Bankuptcy Law. These two requests attract attention to the der of procedure, the burden "to show," in a Massachusetts ourt only. A judge, giving or refusing such requests, would ot suppose that he was construing or giving effect to a bankuptcy act, too plain at this point to require any construction to leave any question as to its effect.

Kreitlein v. *Ferger*, 238 U. S. 21, is cited by the petitioners o show that the Court has jurisdiction. The distinction be-

tween that case and the one at bar is that it involved an interpretation of the Bankruptcy Act and a decision as to its requirements. It did not have to do with probative requirements. The questions involved were, (1) whether the debt at hand was upon a contract, express or implied, within the meaning of those words as used in the Bankruptcy Act; (2) whether a description of a debt as an account for merchandise sufficiently described a judgment for damages in a larger amount rendered on that account; (3) whether "C." Ferger, without other indication of the first name, is a sufficient naming of the creditor; and (4) whether "Indianapolis," without street or number, is a sufficient address. These are all questions as to the meaning and requirements of the Bankruptcy Act.

The same distinction exists in *Crawford* v. *Burke*, 195 U. S. 176; *Neal* v. *Clark*, 95 U. S. 704, cited for the petitioners.

There is no law of the United States which would prevent a Massachusetts Court from holding that when a man sues on one of its judgments, he is entitled to a judgment unless the defendant shows all the facts necessary to prevent. If such a ruling is erroneous, it is an error of Massachusetts procedural law only.

The Bankruptcy Law conferred on the defendant no right or privilege to compel a Massachusetts Court to relieve him from showing that his Massachusetts judgment creditor had succeeded in getting notice of his bankruptcy, notwithstanding that the bankrupt had omitted the judgment creditor from the schedule. The only right or privilege conferred, as to non-scheduled creditors, was to have the Massachusetts Court treat the discharge as a bar as to those claims as to which it is a bar, namely, the claims of those creditors who have notice or knowledge. As to how or by whom this notice or lack thereof shall be shown, the Bankruptcy Act says not.

SECOND.

THE SUPREME JUDICIAL COURT OF MASSACHUSETTS DECIDED THIS CASE CORRECTLY.

The only question presented to the Supreme Judicial Court was whether the Superior Court erred in refusing to give the third and fourth requests for ruling, namely, that the burden is upon the plaintiff to show that he was not notified of the defendant's bankruptcy and that he had no knowledge of it (p. 14).

Attention is called to the narrowness of this question because the petitioners in their brief have argued other questions that are not raised by the requests for rulings. They urge that the Court erred in presuming (1) that the claim was not scheduled, although the evidence showed that the creditor's name was not, and (2) that the bankrupt knew the name of this creditor. No ruling was presented to raise any such question in the Superior Court, and there is nothing to indicate that the Court made any such presumption.

There was no request for a ruling that upon all the evidence the plaintiff was not entitled to a finding. The bill of exceptions purports to state all of the requests for rulings of law and how each was disposed of, and there is no request contained therein for a ruling on all the evidence. There is no request for a ruling that there was not sufficient evidence to prove that the plaintiff's claim was not properly scheduled. There is no request relating in any respect to what evidence was necessary to prove that the plaintiff's claim was not scheduled except the fifth request and this was expressly *waived* (p. 14).

The only exceptions which the defendants took were to the refusal to give the third and fourth requests for rulings. These in no wise relate to the question of whether the plaintiff's claim was scheduled. The statement in the bill of exceptions, "the defendants being aggrieved by such finding" (p. 15), is merely the usual formal way of stating that the result of such adverse rulings as were made and excepted to was prejudicial to the defendants. The bill does not purport to state that any exception was taken to the findings.

It is well settled in Massachusetts that where no ruling has been asked for prior to the finding, it is too late, after it has been made, to except to the finding on the ground that it is not warranted by the evidence.

Keohane, Petitioner, 179 Mass. 69.
Richards v. *Appley,* 187 Mass. 521.

There is no provision of law in Massachusetts permitting exceptions to a finding.

Porter v. *Porter,* 236 Mass. 422.

Thus, in accordance with its well-established practice, the Supreme Judicial Court of Massachusetts did not purport to deal with the question of whether there was sufficient evidence to show that the plaintiff's claim was not scheduled. The Court expressly says, "The questions presented relate wholly to the burden of proof" (p. 21). The Court does not discuss the question of scheduling. Evidently the Court did not regard that question as before it. The Record does not show that it was, or that the defendants attempted to present it.

On the contrary, the brief for the defendants before that Court shows that it was not. That brief says:

"THE ISSUE INVOLVED.

"In view of the foregoing facts as shown by the Record, the sole issue in this case appears to be whether or not the Court below erred as a matter of law in refusing to give the defendant's requests numbered 3 and 4 relative to the burden of proof on the question of the plaintiffs' notification of, or knowledge concerning, the bankruptcy of Warren M. Hill. . . . "

"II.

"The defendant's testator failed to schedule the plaintiff's debt, but this was not material if the creditor had notice or actual knowledge of the bankruptcy proceedings. . . . "

In accordance with its invariable practice, the Supreme Judicial Court of Massachusetts would have treated all other questions as waived.

Whitman v. *Boston & Maine Railroad*, 7 Allen, 313, 329.
Pope & Cottle Co. v. *Wheelwright*, 240 Mass. 221, 225.
Ryder v. *Ellis*, 241 Mass. 50, 60.

Also the fact of Hill's knowledge of Smith's name was evident. The plaintiff had recovered judgment against the defendant in Boston, the place of the defendant's residence. The plaintiff is described as living in the same small town near Boston in which he had lived at the time he recovered judgment. The defendant in his affidavit of defense does not allege that he did not know of this judgment (p. 9). The judgment raised a presumption of regularity, from which it

must necessarily be inferred that the defendant in that action had notice of the suit, and hence must know the plaintiff's name. In the absence of denial by the defendant, the evidence was sufficient to warrant a finding that the defendant knew the plaintiff's name. There is nothing to suggest that the claim was scheduled under another name. If it had been, this would have been pointed out while the schedules were before the trial court. The question, however, is not before this Court, because no request for rulings presents it and it was not passed upon by the Supreme Judicial Court.

The petitioners urge that the plaintiff's knowledge of the bankruptcy was a matter peculiarly within his own knowledge and that a presumption of such knowledge, therefore, arises from his failure to deny knowledge. The petitioners call attention in this connection to the fact that the affidavit of no defense filed by the plaintiff (p. 7) could not be considered as evidence in the plaintiff's favor of the facts stated in it. It is true that the affidavit is not evidence in the plaintiff's favor, but it is forceful to prevent the arising of any presumption of knowledge from failure to deny knowledge. The usefulness to the plaintiff of these affidavits goes further, however. After the plaintiff had filed his affidavit that he did not have notice or knowledge of the proceedings (p. 7), the defendant attempted as best he could to meet that affidavit by his own counter-affidavit (p. 9), and in his counter-affidavit he does not deny the plaintiff's statement. This amounts to an admission by the defendant, by omission, that the plaintiff had no notice or knowledge.

On the only question that was before the Massachusetts Court — that is, whether the burden to show lack of notice and lack of knowledge was on the plaintiff, an *unscheduled* creditor — it is submitted that the Massachusetts Court decided correctly. This is supported by all the authorities in point, which have been cited.

Smith v. *Hill*, 232 Mass. 188; Record, p. 20.
Parker v. *Murphy*, 215 Mass. 72, 75, semble.
Bailey's Adm. v. *Gleason*, 76 Vt. 115, 118.
Wineman v. *Fisher*, 135 Mich. 604, 608.
Sloan v. *Grollman*, 113 Md. 192, 194.
Calmenson v. *Moudry*, 137 Minn. 123, 126.
Armstrong v. *Sweeney*, 73 Neb. 775.
Bogart v. *Cowboy State Bank & Trust Co.*, 182 S. W. 678, 682.
Bunting Stone Hardware Co., Inc. v. *Alexander*, 190 S. W. 1152, 1153.
Collins v. *Crews*, 3 Ga. App. 238.

The decision follows the fundamental principle that the burden of proving an affirmative case is upon the plaintiff, and of proving an affirmative defense is on the defendant. The defendant by proving his discharge established a complete defense, until the plaintiff showed that he was in an exceptional position not covered by the discharge, namely, that he had not been scheduled. He thereby showed himself to be in a position where the discharge did not bar his claim. Just as the burden was on the plaintiff to show the exception on which he relied, so equally the burden was then on the defendant to show the exception on which he relied, namely, that the plaintiff was excepted from his exceptional position by the fact that he had notice or knowledge of the bankruptcy. The same principle which put upon the plaintiff the burden of

showing the exception which took the plaintiff out of the effect of the discharge, put upon the defendant the burden of showing the exception which put the plaintiff back within the effect of the discharge.

The cases cited for the petitioners do not support their contention. They are cases in which it had *not* been shown that the creditor who sought to escape the discharge had *not been scheduled.* On the contrary, they are cases in which there was no evidence as to whether or not the creditor had been scheduled. This is true of *Matter of Peterson,* 137 App. Div. (N. Y.) 435; *Larsen* v. *Hyman,* 126 N. Y. S. 100; *Niles* v. *Havens,* 190 N. Y. S. 656; *Laffoon* v. *Kerner,* 138 N. C. 281; *Manheim* v. *Loewe,* 173 N. Y. S. 260; and *Bank of Lafayette* v. *Phipps,* 101 S. E. 696 (Ga. App.). In *Alling* v. *Straka,* 118 Ill. App. 184, the error consisted of excluding the discharge entirely and of refusing to permit the bankrupt to show that the creditor had knowledge. In *Steele* v. *Thalheimer,* 74 Ark. 516, the debt was scheduled, the decision relating exclusively to the effect of an incorrect address. *Thompson* v. *Caverly,* 148 Ill. App. 295, merely holds that parol evidence is incompetent to prove the contents of a bankruptcy schedule and contains no dicta supporting petitioner's contention; *Van Norman* v. *Young,* 228 Ill. 425, involves only the question of who has the burden of proving that the debt was fraudulently contracted. In *Morency* v. *Landry,* 79 N. H. 305, 108 Atl. 855, no known creditor had been omitted from the schedule. There is no intimation in the opinion that the burden is upon a non-scheduled creditor to show that he did not have knowledge. The Court held only that where the creditor whose rights were those of an assignee only had failed to introduce any evidence that the bankrupt knew of the assignment and

so knew that the assignee was a creditor, it was unnecessary to consider whether or not the finding of actual notice was warranted by the evidence. In *Delta Co. Bank* v. *McGranahan*, 37 Wash. 307, it appeared affirmatively that the creditor had due notice and actual knowledge of the bankruptcy proceedings. On an inspection of these opinions it is apparent that the concession of the Massachusetts Court (232 Mass. 192; Record, p. 23) that there are contrary decisions is not required by the decisions cited. This is not a matter on which there is actual conflict of authority.

None of the cases cited decides that a *non-scheduled* creditor must show that he did not have notice.

Kreitlein v. *Ferger*, 238 U. S. 21, gives no support to the petitioner's theory. The Court deals merely with the sufficiency of the description in the schedules and reaches the conclusion that the creditor was duly scheduled. The statement of the Court that the introduction of the certificate of discharge makes out a *prima facie* defense was followed in the case at bar (Request No. 1, p. 14), but the plaintiff met this *prima facie* defense by showing that he was *not scheduled*. There is no suggestion in the opinion in *Kreitlein* v. *Ferger* that after the plaintiff has met the *prima facie* defense by showing that he was not scheduled, he has the further burden to show also that in addition to this irregularity he got no notice. After the creditor has shown that the bankrupt has done his best to keep notice from the creditor by leaving him off the schedule, he is not obliged to go further and show that the bankrupt was successful in keeping him in ignorance.

The provisions of Section 21 (f) of the Bankruptcy Act, that the certified copy of the order of discharge "shall be evidence of the jurisdiction of the Court, the regularity of the proceedings and of the fact that the order was made," has no bearing on the case at bar. It may be conceded that the order of discharge was evidence of the regularity of the proceedings, including proper scheduling of the name of the plaintiff as a creditor. That evidence was met by the positive proof that his name had not been scheduled. Obviously the discharge was not evidence that an unscheduled creditor had received notice. No "regularity of proceedings" would give notice to a non-scheduled creditor.

If the trial court had been requested to make specific findings, these would necessarily have been substantially as follows: The plaintiff obtained a valid judgment against the defendant which remains unsatisfied. Subsequently thereto the defendant was duly discharged in bankruptcy proceedings. The name of the plaintiff, though known to the defendant, was not duly scheduled in such proceedings and there is no evidence that the plaintiff had any notice or knowledge of the bankruptcy proceedings. Applying the terms of the statute to such findings, no other result could follow than judgment for the plaintiff.

The statute says:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . have not been duly scheduled . . . with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy. . . ."

This necessarily requires, in order to bar a debt, that it be possible for the Court to find that a non-scheduled creditor had such notice or knowledge.

A bankrupt who knows the name of a creditor and omits to schedule him cannot have a discharge from the claim of that creditor unless the bankrupt can show that by some happy accident, or otherwise, the creditor had notice or knowledge of the bankruptcy and so did not suffer by this omission from the schedule.

Respectfully submitted,

EDWARD F. McCLENNEN,
ALLISON L. NEWTON,
For the Respondent.

Reversed.

HILL ET AL., EXECUTORS OF HILL, *v.* SMITH.

CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

No. 164. Argued January 3, 1923.—Decided January 15, 1923.

1. A federal question which was treated as open, and decided, by the State Supreme Court, will be reviewed here without inquiring whether its federal character was adequately called to the attention of the state trial court. P. 594.
2. A question of burden of proof may amount to a federal question when intimately involving substantive rights under a federal statute. P. 594.

3. The burden of proof is one thing and the necessity of producing evidence to meet that already produced another. P. 594.

4. A creditor who would avoid the effect of a discharge under the Bankruptcy Act upon the ground that the debt was not scheduled, with his name, must prove himself within that exception, and the debtor who would excuse the omission of the creditor's name upon the ground that the creditor had notice or actual knowledge of the bankruptcy proceedings must prove himself within that exception to the exception. P. 594.

232 Mass. 188, affirmed.

CERTIORARI to a judgment of the Superior Court of Massachusetts, entered on a finding for the plaintiff made subject to exceptions, which were overruled by the Supreme Judicial Court, in an action on a judgment.

Mr. George S. Fuller, with whom *Mr. Edward E. Blodgett* and *Mr. Irving F. Carpenter* were on the brief, for petitioners.

Mr. Edward F. McClennen, with whom *Mr. Allison L. Newton* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit upon a judgment. The defendant, Warren H. Hill, pleaded a discharge in bankruptcy. Subsequently he died and his executors, the petitioners, took his place. There was a trial before a judge without a jury. The plaintiff introduced proof that the judgment was unsatisfied and rested. The defendants proved the discharge and rested. In rebuttal the plaintiff introduced the schedules of creditors in bankruptcy of Hill in which schedules the plaintiff's name did not appear. The defendants asked for rulings that the burden was upon the plaintiff to show that he was not notified of the defendant's bankruptcy and that he had no knowledge of it.

These were refused subject to exceptions and the Court found for the plaintiff. The exceptions were overruled by the Supreme Judicial Court and judgment was entered upon the finding. 232 Mass. 188. A writ of certiorari was allowed by this Court.

It is argued for the respondent that there is no jurisdiction in this Court because the attention of the trial judge was not called specifically to the Bankruptcy Act as a ground for the rulings asked, and because, even if it had been, it is said, the burden of proof is to be determined by the practice of the State. As we are of opinion that the judgment was right we shall not discuss these objections at length. We deem it enough to say, as to the first, that the appellate Court treated the question as open and decided it; and as to the second that here as in *Central Vermont Ry. Co.* v. *White*, 238 U. S. 507, though perhaps in a somewhat less intimate and obvious way, the burden of proof is so connected with the substantive rights given to the respective parties by the statute—indeed so flows from the words of the statute—that the ruling upon it may be reviewed here.

The merits were fully and adequately discussed by the Supreme Judicial Court. In order to dispose of them it will not be necessary to repeat the distinction, familiar in Massachusetts since the time of Chief Justice Shaw, *Powers* v. *Russell*, 13 Pick. 69, and elaborated in the opinion below, between the burden of proof and the necessity of producing evidence to meet that already produced. The distinction is now very generally accepted, although often blurred by careless speech. Thayer, Preliminary Treatise on Evidence, c. 9.—The Bankruptcy Act of July 1, 1898, c. 541, § 17*a*(3), 30 Stat. 550, amended, Act of Feburary 5, 1903, c. 487, § 5, 32 Stat. 798, provides that a discharge "shall release a bankrupt from all of his provable debts, except such as . . . (3) have not been duly scheduled in time for proof and

allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." (The Amendment of March 2, 1917, c. 153, 39 Stat. 999, does not change this language, and was adopted after the discharge.) By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so. *Kreitlein* v. *Ferger*, 238 U. S. 21, 26. *McKelvey* v. *United States*, *ante*, 353. But there is an exception to the exception, "unless the creditor had notice," &c., and, by the same principle if the debtor would get the benefit of that he must offer evidence to show his right. We agree with the Court below that justice and the purpose of the section justify the technical rule that if the debtor would avoid the effect of his omission of a creditor's name from his schedules he must prove the facts upon which he relies.

The petitioners urge two further objections. They say that it did not appear that the debtor knew the name of his creditor. The trial judge was warranted in inferring that when a judgment had been recovered against him in Boston, where he lived, he knew the name of the man who recovered it and who lived hard by. Again, they say that the debt may have been scheduled under some other name. The judge had the schedule before him and for all that appears well may have inferred that it was not. But we cannot treat these questions as open. The Supreme Judicial Court stated that the questions presented related wholly to the burden of proof and it was said at the argument and not denied that in their brief before that Court the petitioners asserted that the sole issue was on the refusal to give the requests stated above. That is all that is before us now, although we have been unwilling to let the petitioners suppose that were it otherwise they would be better off.

Judgment affirmed.